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No.

In the

Supreme Court of the United States

SUBMERSIBLE SYSTEMS, INC.,

Petitioner,

versus

PERFORADORA CENTRAL, S.A. de C.V.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

David W. Stewart
Bryant Clark Dukes
Blakeslee Ramsay &
Hammond, P.L.L.C.
2223 14th St
Gulfport, MS 39501
(228) 863-6101

Michael H. Bagot, Jr.
Counsel of Record
Thomas A. Rayer, Jr.
Wagner & Bagot
650 Poydras Street
Suite 2660
New Orleans, LA 70130
(504) 525-2141

Curry & Taylor (202) 393-4141/ussupremecourt@hotmail.com

154PP

Questions Presented for Review

1. When the district court has entered an order prohibiting the defendant from removing, encumbering, selling, transferring or otherwise disposing of the *res*, has the court exercised constructive control over the *res* sufficient to sustain its *quasi in rem* jurisdiction under Supplemental Admiralty Rule B?

2. May a non-resident defendant judicially stipulate that it is "present within the jurisdiction" sufficient to defeat admiralty jurisdiction under Supplemental Admiralty Rule B without conceding at least the *in personam* jurisdiction of the district court?

3. Is the standard to establish jurisdiction under Rule 4(k)(2) more stringent and narrower than that applicable under *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), or *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980)?

LIST OF PARTIES

1. Submersible Systems, Inc.

2. Perforadora Central, S.A. de C.V.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, petitioner has no corporate parent, and no portion of its stock is owned by a publicly held company.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

SUBMERSIBLE SYSTEMS, INC.,
Petitioner,

VERSUS

PERFORADORA CENTRAL, S.A. de C.V.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Submersible Systems, Inc., respectfully prays that a Writ of Certiorari issue to review the judgments and opinions of the U.S. Court of Appeals for the Fifth Circuit entered on May 4, 2001 and June 28, 2001.

CITATIONS OF REPORTS OF OPINIONS

The Fifth Circuit's initial decision is reported as *Submersible Systems, Inc. v. Perforadora Central, S.A. de C.V.*, 249 F.3d 413 (5th Cir. 2001).

The Fifth Circuit's ruling on rehearing is reported as *Submersible Systems, Inc. v. Perforadora Central, S.A. de C.V.*, 2001 WL 849726 (5th Cir. 2001).

No other decisions in the case were reported.

STATEMENT OF JURISDICTION

The Fifth Circuit entered judgment in favor of respondent and against petitioner on May 4, 2001. Petitioner timely moved for panel and *en banc* rehearing. The Fifth Circuit denied petitioner's request on June 28, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULES INVOLVED IN THIS CASE

I. Fifth Amendment - U.S. Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

II. Rule 4(k)(2) - Federal Rules of Civil Procedure

If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

III. Rule B - Supplemental Rules for Certain Admiralty and Maritime Claims:[1]

Rule B. Attachment and Garnishment: Special Provisions

(1) **When Available; Complaint, Affidavit, Judicial Authorization, and Process.** With respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees to be named in the process to the amount sued for, if the defendant shall not be found within the district. Such a complaint shall be accompanied by an affidavit signed by the plaintiff or the plaintiff's attorney that, to the affiant's knowledge, or to the best of the affiant's information and belief, the defendant cannot be found within the district. The verified complaint and affidavit shall be reviewed by the court and, if the conditions set forth in this rule appear to exist, an order so stating and authorizing process of attachment and garnishment shall issue. Supplemental process enforcing the court's order may be issued by the clerk upon application without further order of the court. If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make review by the court impracticable, the clerk shall issue a summons and process of attachment and garnishment and the plaintiff shall have the burden on a post-attachment hearing under Rule E(4)(f) to show that exigent circumstances existed. In addition, or in the alternative, the plaintiff may, pursuant

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[1] Rule B was amended effective December 1, 2000. The amendments do not affect any of the questions presented in this petition but all citations of, and references to, Rule B are to the Rule as written at the time of the events giving rise to the proceedings below.

to Rule 4(e), invoke the remedies provided by state law for attachment and garnishment or similar seizure of the defendant's property. Except for Rule E(8) these Supplemental Rules do not apply to state remedies so invoked.

(2) Notice to Defendant. No judgment by default shall be entered except upon proof, which may be by affidavit, (a) that the plaintiff or the garnishee has given notice of the action to the defendant by mailing to the defendant a copy of the complaint, summons, and process of attachment or garnishment, using any form of mail requiring a return receipt, or (b) that the complaint, summons, and process of attachment or garnishment have been served on the defendant in a manner authorized by Rule 4(d) or (i), or (c) that the plaintiff or the garnishee has made diligent efforts to give notice of the action to the defendant and has been unable to do so.

(3) Answer.

(a) By Garnishee. The garnishee shall serve an answer, together with answers to any interrogatories served with the complaint, within 20 days after service of process upon the garnishee. Interrogatories to the garnishee may be served with the complaint without leave of court. If the garnishee refuses or neglects to answer on oath as to the debts, credits, or effects of the defendant in the garnishee's hands, or any interrogatories concerning such debts, credits, and effects that may be propounded by the plaintiff, the court may award compulsory process against the garnishee. If the garnishee admits any debts, credits, or effects, they shall be held in the garnishee's hands or paid into the registry of the court, and shall be held in either case subject to the further order of the court.

(b) By Defendant. The defendant shall serve an answer within 30 days after process has been executed, whether by attachment of property or service on the garnishee.

STATEMENT OF THE CASE

This case involves the intentional conversion of property of Submersible Systems, Inc. ("SSI") while it was aboard the M/V DON FRANCISCO, a vessel owned and operated by Perforadora Central, S.A. de C.V. ("Central") in navigable waters in the port of Dos Bocas, Mexico. SSI is a small, Louisiana Chapter "S" corporation which owned and operated remotely operated vehicles ("ROVs"), small unmanned submarine-type vehicles used for underwater inspection, surveying and construction. Central is a large, privately-held Mexican corporation, with offices in Mexico and, throughout the district court proceedings, in Mississippi. Central owns and operates both inland and offshore drilling and support equipment, including several jack-up drilling rigs, inland barges, supply boats, and a crew boat.

Both SSI and Central contracted with Quantum Ingineros ("Quantum") to perform pipeline inspection-related work off the coast of Mexico. Central's M/V DON FRANCISCO was dispatched in late 1996 to Morgan City, Louisiana, to load SSI's equipment and personnel and transport them to Mexico. After months of operation, on June 23, 1997, Central's captain told SSI's employees that SSI's equipment had been seized because of Quantum's failure to pay Central. When SSI could not obtain the release of the equipment initially from Central, and thereafter through diplomatic channels or through the Mexican Ministerio Publico (a government functionary similar to a district attorney), SSI filed suit in the U.S. District Court for the Southern District of Mississippi, the district wherein Central was building a drilling rig financed by the U.S. Maritime Administration. Jurisdiction was based on 28 U.S.C. §§ 1332 (diversity) and 1333 (admiralty). In its suit, SSI's sought to

attach Central's property pursuant to Rule B and/or Rule 64 of the Federal Rules of Civil Procedure and Mississippi Code §§ 1131.1, *et seq.*, and/or 1133.1 *et seq.*

In response to SSI's request, Central's counsel advised SSI that its Rule B allegation that Central could not be found within the district was "incorrect" and threatened to charge SSI with "bad faith" attachment if it proceeded under Rule B.[2] Central also appointed its counsel as agent for service of process[3] and ultimately accepted process through counsel.[4] Moreover, Central conceded that it was "subject to personal jurisdiction in the district by virtue of [its] contacts with the district."[5] It also stated that it had a managing agent in the district.[6] The foregoing representations and arguments were made in conjunction with Central's preliminary motions to dismiss for *forum non conveniens*, lack of admiralty jurisdiction and lack of jurisdiction under Rule B.

On September 1, 1998, the district court entered an Agreed Order, whereby a hearing on SSI's Motion for Preliminary Injunction (to prevent the encumbering, movement or disposal of Central's assets) was postponed indefinitely upon Central's stipulating that it would "give at least 28 days notice of intent to move or to encumber, sell, transfer or otherwise dispose of the drilling rig now under

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[2] 4th Supp. R: 341-342.

[3] *Id.*

[4] 4th Supp. R: 110.

[5] 4th Supp. R: 80.

[6] 4th Supp. R: 81-82.

construction at the yard of Halter Marine, Inc., in Pascagoula, Mississippi."[7]

On September 25, 1998, the district court denied Central's motion to dismiss for lack of admiralty jurisdiction and its motion to dismiss on the basis of *forum non conveniens*. Moreover, the court found that Central had "sufficient contacts with the State of Mississippi to confer personal jurisdiction." The court further found that "SSI did not diligently search for an officer or employees of Perforadora in order to effect service." Rule B attachment was denied "because Central could be found within the district." Although the court allowed the attachment of Central's property under Mississippi state law, it required SSI to place a $1 million bond with the court. SSI did not place the bond because of its dire financial condition as a result of Central's conversion of its property.

Ultimately, the district court rendered a Memorandum Opinion on November 23, 1998, expounding more fully on its earlier ruling denying Perforadora's various motions, denying SSI's motion for a Rule B attachment, and reiterating that it would allow SSI to attach Central's property under Mississippi state law upon posting a $1 million bond. The district court denied Rule B attachment because "[Central] is doing business within Mississippi," and it "stated that [it is] present within the Southern District of Mississippi by virtue of an office located at the Halter Marine Shipyard in Pascagoula." Alternatively, the district court held that Rule B attachment

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[7]The Agreed Order was never modified or rescinded. Moreover, Central never notified SSI or the district court of any intended movement of the rig or change in its status before the entry of judgment.

was not available because an affidavit by SSI's counsel was not in the record,[8] and SSI failed to diligently search for an office or employees of Central within the district.

Following substantial discovery, the case was tried to the district court sitting in admiralty. The district court rendered its Bench Opinion and Final Judgment on July 19, 1999, which awarded substantial damages to SSI. Subsequently, SSI filed a Renewed Motion for Writ of Attachment. Following a hearing, Central filed a bond, securing SSI's claim during the pendency of its post-trial motions and appeal. Central's post-trial motions were disposed of by the district court on February 18, 2000. Central then appealed, and SSI cross-appealed.

The Fifth Circuit reversed the decision of the trial court on May 4, 2001 on the grounds that the court did not have personal jurisdiction over Central and that SSI failed to comply with the requirements of Rule B by failing to file an affidavit of counsel with the district court. SSI timely moved for panel and *en banc* rehearing. On June 28, 2001, the Fifth Circuit supplemented the record with the affidavit of SSI's counsel, but affirmed that the district court lacked personal jurisdiction over Central and held that the district court was "without jurisdiction to enter a *quasi in rem* judgment in this case" because "the rig has now left the Southern District of Mississippi."

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[8] Following the Fifth Circuit's initial decision, the district court searched its records again at SSI's request and located counsel's affidavit in the work file of the judge to whom the case was originally allotted.

REASONS FOR GRANTING THE WRIT

A. Physical Attachment Is Not Required When the Court has Constructive Jurisdiction over the *Res*.

The decision of the Fifth Circuit elevates form over substance, mandating physical attachment of property and multiple emergency or interlocutory appeals in order to preserve the jurisdiction of the district courts. *Republic National Bank of Miami v. U.S.*, 506 U.S. 80, 87 (1992), requires the reversal of the Fifth Circuit's decision.

Historically, jurisdiction over the person of the defendant was the sole means of a court's entering and enforcing judgment. Over time, the doctrines of *in rem* and *quasi in rem* jurisdiction evolved as a means of "expand[ing] the reach of the courts and ... furnish[ing] remedies for aggrieved parties." *Republic*, 506 U.S. at 87, citing *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19, 23 (1960), and *Harmony v. U.S.*, 43 U.S. (3 How.) 210, 233 (1844). Those doctrines were never intended to provide defendants with the means of defeating plaintiffs' claims for redress. *Republic*, 506 U.S. at 87. Significantly, *quasi in rem* and *in rem* claims have a long history in admiralty, predating the Republic. *Manro v. Almeida*, 23 U.S. (10 Wheat.) 473, 488-90 (1825), *Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi, S.A. de Navegacion*, 773 F.2d 1528, 1531-1533 (11th Cir. 1985).

Attachments serve a dual purpose - (a) establishing jurisdiction over a nonresident defendant, to the extent of his interest in property within the jurisdiction, and (b) providing security from which any judgment might be paid. *Swift & Co. Packers v. Compania Columbiana Del Caribe*, 339 U.S. 684,

693 (1950). In a traditional maritime setting involving ships capable of swift departures, these purposes were met by serving a writ on the property to be seized:

> Confessedly the object of the writ was to bring the property under the control of the court and keep it there, as well as to give notice to the world. These objects would have been fully accomplished if its direction had been nothing more than to hold the property subject to the order of the court, and to give notice.

Miller v. U.S., 78 U.S. (11 Wall.) 268, 294-5 (1871), cited in *Republic*, 506 U.S. at 87. *See also Polar Shipping Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627, 637 (9th Cir. 1982). Thus, when property is held subject to the order of the court and notice is given to all parties, the purposes of attachment are met.

In similar circumstances, the courts have allowed actions to proceed without the necessity of physical attachment. For example, in forfeiture suits, governed "as near as may be to proceedings is admiralty," 28 U.S.C. § 2461(b), involving real property, formal seizure is not required because (1) the appropriate forum, i.e., the forum of the place where the property is, can be determined without seizure, and (2) seizure is not required to ensure that the property is not sold, destroyed or used for further illegal activity. *U.S. v. James Daniel Good Real Property*, 510 U.S. 43, 57-58 (1993). In the instant case, Central's rig was not going anywhere as a matter of fact (due to its level of construction) and as a matter of law (due to the order of the court).

Moreover, while admiralty courts have typically required a physical seizure before recognizing jurisdiction over the owner or claimant of a readily mobile vessel, that requirement is not sacrosanct. For example, physical seizures are not required in cases where bonds are filed, *Munks v. Jackson*, 66 F. 571 (9th Cir. 1895); claims are filed, *The MERINO*, 22 U.S. 391 (1824); *The ROSALIE M.*, 12 F.2d 970 (5th Cir. 1926); *Cactus Pipe & Supply Co. v. M/V MONTMARTRE*, 756 F.2d 1103 (5th Cir. 1985); the parties separately agree to accept letters of undertaking in lieu of seizure, *Continental Grain Co. v. Federal Barge Lines, Inc.*, 268 F.2d 240 (5th Cir.), *aff'd*, 364 U.S. 19 (1959); *Panaconti Shipping Co., S.A. v. M/V YPAPANTI*, 865 F.2d 705 (5th Cir. 1989); *Chan v. Society Expeditions, Inc.*, 123 F.3d 1287 (9th Cir. 1997), *cert. dismissed*, 522 U.S. 1100 (1998); or owners agree to abide by future orders affecting the property, *U.S. v. MARUNAKA MARU NO. 88*, 559 F. Supp. 1365 (D. Alaska 1983). Each of these circumstances provides individual confirmation of (a) holding the disposition of the vessel or other property for the order of the court and (b) notice. These cases demonstrate the longstanding practice that "constructive control" of the *res* suffices, when (a) the *res* cannot be disposed of without court approval and (b) that information is known by the owner/claimant.

In *Republic*, this Court reiterated that all that is necessary for *in rem* jurisdiction is that the court have "actual or constructive control of the *res* when...suit is initiated." *Republic*, 506 U.S. at 87, interpreting *The BRIG ANN*, 13 U.S. (9 Cranch) 289 (1815).

In the instant case, the district court had more than constructive control of the *res*; under the Agreed Order, the *res* could not be encumbered, moved or disposed of without

advance notice to the Court and SSI. This order remained in effect from the start of the case until after judgment was rendered, at which time Central provided a bond to secure SSI's judgment.

> The fact that the rig later left the jurisdiction is not relevant: "[s]tasis is not a general prerequirement to the maintenance of jurisdiction. Jurisdiction over the person survives a change in circumstances,...as does jurisdiction over the subject matter....Nothing in the nature of *in rem* jurisdiction suggests a reason to treat it differently." *Republic*, 506 U.S. at 88 (citations omitted).

Obviously, this is not a case wherein any judgment would be "useless." No judgment is useless which "will have any effect whatever." *U.S. v. The LITTLE CHARLES*, 26 F. Cas. 979 (No. 15,612) (C.C.Va. 1818) (Marshall, C.J.); *The RIO GRANDE*, 90 U.S. 458 (1874); *Elliott v. M/V LOIS B*, 980 F.2d 1001, 1005 (5th Cir. 1993); *Stevedoring Services of America v. Ancora Transport*, 59 F.3d 879 (9th Cir. 1995).

Because a judgment rendered in a United States court may be enforced against Central's assets either in the United States or in Mexico, this Court can and should hold that *quasi in rem* jurisdiction exists to support a judgment.

SSI submits that there is no basis for distinguishing cases in which seizure is initially ordered, but later vacated either inadvertently or improperly, *see, e.g. The RIO GRANDE, supra*, and those in which seizure is never ordered, but in which the property remains within the court's jurisdiction and/or is under the court's control by court

order.[9] If the "uselessness" criterion is applied in this case, it is apparent that jurisdiction should be maintained, given the existence of the bond, Central's property holdings in the United States, and Central's admitted, continued presence in the United States.

Finally, adherence to the rule in the Fifth Circuit's decision will require multiple, interlocutory appeals in cases where physical seizures are not obtained, particularly in cases where (1) the district courts instructed the defendants to give advance notice before moving or disposing of the property, and (2) the district courts upheld jurisdiction over the defendants on other grounds. Under circumstances where the district courts have constructive control of the *res*, there is no need for emergency or interlocutory appeals, which will burden the appellate courts with issues they need not decide. *See, e.g., In re Atlantic Gulf v. West Indies S.S. Lines (The AGWISUN)*, 20 F.2d 975 (S.D.N.Y. 1927), *cited in Continental Grain Co. v. Federal Barge Lines, Inc., supra.* In *Continental Grain*, the appellate court agreed to accept letters of undertaking in lieu of physical seizure, explaining that "any other course would imperil the desirable avoidance of needless cost, time, and inconvenience to litigants, counsel, ships, Clerks, Marshals, Keepers and court personnel." 268 F.2d at 243. Upholding the Fifth Circuit's decision in this case will multiply, not avoid, the same inconvenience and waste of money and time.

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[9] The principle of constructive control has also been applied in cases involving personal property in foreign countries. See *U.S. v. All Funds on Deposit*, 63 F.3d 148, 153-4 (2nd Cir. 1995)

B. The Standard for Presence in the Jurisdiction for Purposes of Rule B is the Same as Having "Minimum Contacts" Necessary to Establish Personal Jurisdiction.

The Fifth Circuit properly recognized that a defendant within the district for purposes of Rule B necessarily had sufficient minimum contacts with the forum to establish personal jurisdiction over it. See Panel Opinion of May 4, 2001 at p. 15 (..."[W]e disagree with the district court's conclusion that Central's contacts were sufficient to permit it to exercise jurisdiction over this action. Thus, the district court erred in concluding that Central would be found within the Southern District of Mississippi for the purposes of Rule B.")

When Central acknowledged judicially that it was present within the jurisdiction sufficient to defeat Rule B, it thereby conceded at the very least that it (1) was subject to the personal jurisdiction of the court and (2) had an agent for service of process within the district. *LaBanca v. Ostermunchner*, 664 F.2d 65, 67 (5th Cir. 1981). Thus, the trial court concluded that Rule B could not be invoked because Central was subject to the personal jurisdiction of the court.

Admiralty courts have uniformly recognized that "being found" in the district for purposes of Rule B is the same as satisfying the constitutional "minimum contacts" requirement to assert personal jurisdiction over a nonresident. *See LaBanca*, 664 F.2d at 68 (first prong was satisfied because the defendant had "'minimum contacts' necessary to provide jurisdiction"); *Cobelfret-CIE Belge v. Samick Lines Co., Ltd.*, 542 F.Supp. 29, 31 (W.D. Wash. 1982) (first prong was satisfied because the "defendant systematically

conducted business within the state and therefore subjected itself to the exercise of the Court's *in personam* jurisdiction"); *Sociedad Transoceanica Canopus, S.A. v. Interamerican Refining Corp.*, 185 F.Supp. 294, 296 (D. N.J. 1960) ("found within district" is satisfied if *International Shoe* requirements are met); *Integrated Container Service, Inc. v. Starlines Container Shipping, Ltd.*, 476 F.Supp. 119, 122 (S.D.N.Y. 1979) ("A maritime attachment is precluded under Admiralty Rule B(1) only if the defendants have engaged in sufficient activity in the district... to permit the court to exercise *in personam* jurisdiction over the defendants"). Therefore, the Fifth Circuit's conclusion that "Central can not be said to have conceded the issue of personal jurisdiction" is fatally flawed. Central's statement is a judicial admission, *Martinez v. Bally's Louisiana, Inc.*, 244 F.3d 474, 476-7 (5th Cir. 2001), which the trial court relied upon in finding personal jurisdiction and in denying Rule B attachment. *See Petrowski v. Hawkeye Security Co.*, 350 U.S. 495 (1956), *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982) (personal jurisdiction defense is waivable), *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999) (same). Having conceded personal jurisdiction to avoid Rule B attachment, Central cannot recant and disclaim the court's personal jurisdiction. See *Martinez, supra, Campbell v. Sonat Offshore Drilling*, 979 F.2d 1115, 1119 (5th Cir. 1992), *reh. denied*, 986 F.2d 1420 (5th Cir. 1993).

Nor can Central claim inadvertence or mistake as a defense to waiver. Central's concession was a conscious tactical decision, which was repeated throughout the case. Central appointed counsel as its agent, apprised that it was "found" in the Southern District of Mississippi and threatened SSI with bad faith and wrongful arrest claims if it proceeded. Subsequently, Central's counsel accepted service on its behalf

and formally acknowledged it was "subject to personal jurisdiction in the district by virtue of [its] contacts with the district."

Even at the end of the case, following entry of judgment in SSI's favor, Central's counsel opposed SSI's renewed motion to attach as follows:

> MR. HOBSON: I'm convinced that the plaintiffs are making a big hoorah out of this trying to attract attention. The plaintiffs know we have two other drilling rigs in the United States. This is just not a client who's going to suddenly sneak off into the night. We couldn't do it if we wanted to.

Under the circumstances, Central clearly, convincingly and unmistakenly waived its personal jurisdiction defense.

If the Fifth Circuit's rationale and decision stand, there will be a gap in the admiralty jurisdiction where none previously existed. Instead of having two classes of maritime defendants, one of which is subject to the court's personal jurisdiction, and the other subject to the court's *quasi in rem* jurisdiction, the Fifth Circuit's decision creates a third class; a party beyond the reach of the courts; one that can avoid United States justice altogether by stipulating to the court's jurisdiction for purposes of Rule B, but declining the court's jurisdiction for all other purposes. No other United States court has recognized such an anomalous class.

As a matter of law, there can be no class of maritime defendants (a) whose property is not subject to Rule B

attachment and (b) who are not subject to personal jurisdiction. Stated otherwise, the property of all defendants that are not subject to personal jurisdiction within the district is subject to attachment under Rule B. Therefore, when Central conceded its presence within the district sufficient to defeat Rule B, it necessarily conceded minimum contacts sufficient for personal jurisdiction. *Manro v. Almeida*, 23 U.S. (10 Wheat.) 473, 489 (1825), *In re Louisville Underwriters*, 134 U.S. 488, 493 (1890).

C. The Standard for Jurisdiction under Rule 4(k)(2) is No More Stringent that the "Minimum Contacts" of *International Shoe* and its Progeny.

In this admiralty case, the petitioner alleges personal jurisdiction over the respondent under Rule 4(k)(2). Rule 4(k)(2) was promulgated in 1993 to provide jurisdiction over nonresidents for federal law claims when those nonresidents are not subject to the jurisdiction of any particular state. The amendment was a direct response to this Court's request in *Omni Capital International, Ltd. v. Rudolph Wolff & Co.*, 484 U.S. 97, 111 (1987):

> If we do not create a rule here, the only harm to federal interests is the inability of a private litigant to bring a CEA action in the United States against an alien defendant who is not within the reach of a state Long-Arm Statute...[W]e are not blind to the consequences of the inability to serve process on Wolff and Gourlay. A narrowly tailored service of process provision, authorizing service on an alien in a federal question case when that alien is not amenable to service under the applicable State Long-Arm Statute, might well

> serve the ends of the CEA and other federal statutes. It is not for the federal courts, however, to create such a rule as a matter of common law. That responsibility, in our view, better rests with those who propose the Federal Rules of Civil Procedure and with Congress.

Id.

In response to this request, Rule 4 was modified to add the following:

> (2) If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

The amendment permits the exercise of personal jurisdiction over nonresidents as long as those nonresidents have constitutionally-sufficient contacts with the nation as a whole. Thus, the United States as a whole is treated as though it were one state, and the sufficiency of Central's contacts with the nation is considered in determining whether personal jurisdiction may be exercised over it.

The facts are undisputed that, at the time of filing the petition, Central had the following continuous and systematic contacts with the United States:

1. Central financed the construction of the Drilling Rig, TONALA, with a loan of

$70 million from the United States Government;

2. Central dispatched its vessel to a United States port and there loaded aboard the equipment of SSI a United States corporation;[10]

3. At the time of service, Central had contributed at least $20 million in equity into the construction of the TONALA at a United States shipyard;

4. Central engaged in joint ventures with a United States company;

5. Two of Central's inland drilling rigs, insured for over $10,000,000 each, were chartered to a United States company and working in United States territorial waters;

6. Central had an office in the United States, including a managing agent and two employees, for over eight months when suit was filed, and its office continued to operate in the United States through the entry of judgment by the district court;

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[10] *See Engineering Equip Co. v. S.S. SELENE*, 446 F. Supp. 706, 709-10 (S.D.N.Y. 1978), *cert. denied sub nom. Rockwell International Corp. v. City of New York*, 454 U.S. 1164 (1982) (loading cargo in the United States alone is sufficient to confer specific personal jurisdiction).

7. Central directed various equipment and funds to the United States in connection with the rig construction;

8. Central maintained bank accounts in the United States;

9. Central has sued and been sued[11] in courts in the United States.

Rule 4(k)(2) permits Central's contacts with the United States as a whole to be considered in determining whether the exercise of personal jurisdiction comports with the Constitution and laws of the United States. Under governing jurisprudence, the question is whether Central engaged in "continuous and systematic" activity in the United States so that the exercise of jurisdiction would not offend traditional notions of "fair play and substantial justice." If all of the foregoing contacts existed with one state, instead of the United States at large, no party could seriously challenge personal jurisdiction. *Perkins v. Benguet Mining Co.* 342 U.S. 437, 447-449 (1952); *Holt Oil & Gas v. Harvey*, 801 F.2d 773, 779 (5th Cir. 1986); *Bankhead Enterprises, Inc. v. Norfolk & Western Ry., Co.*, 642 F.2d 802, 805 (5th Cir. 1986). Under Rule 4(k)(2), the same result must obtain. *World Tankers Corp. v. M/V YA MAWLAYA*, 99 F.3d 717, 720 (5th Cir. 1996). Obviously, in light of its significant and continuous United States business operations, Central cannot reasonably contest its constitutional amenability to jurisdiction in the United States.

11

Central has never conceded personal jurisdiction in any United States court in which it has been sued.

In deciding that Central is not subject to the personal jurisdiction of the district court, the Fifth Circuit relied on *Helicopteros National de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984), wherein this Court refused to extend jurisdiction to a Columbian corporation based on one trip to Texas by the corporation's chief executive officer, acceptance of checks drawn on a Texas bank, and purchases of helicopters and related equipment from Texas manufacturers, and related training trips. *Helicopteros* was not a Rule 4(k)(2) case. Moreover, unlike Central's contact in this case, the *Helicopteros* defendant did not maintain an office in Texas with a managing agent, nor did it borrow money from the State of Texas, engage in joint ventures with a Texas company, charter vessels to a Texas company for work in Texas territorial waters, and purposely direct equipment and funds to Texas. All these factors distinguish the present case from *Helicopteros* and illustrate that general jurisdiction existed over Central on the grounds that it carried on "a continuous and systematic, but limited, part of its general business" in the United States. See *Perkins*, 342 U.S. at 438. Central "purposefully avail[ed] itself of the privilege of conducting activities" within the United States. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), *cited in World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 298 (1980). Hence, the exercise of jurisdiction over Central is constitutional.

Moreover, the constitutional touchstone for jurisdiction has been described as one of fairness to the nonresident. Although it might not have been fair to subject many nonresident defendants to the jurisdiction of United States courts fifty or seventy-five years ago, due to the burdens distance and language then posed, times have changed. What was particularly burdensome then is not so now. See *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222-223 (1957); *World-*

Wide Volkswagen Corp., 444 U.S. at 293, and *Helicopteros*, 466 U.S. at 422-3 (Brennan, J., dissenting).

Indeed, "[b]oth history and current international admiralty practice accept the power of a national admiralty court to adjudicate a maritime claim against a nonresident based simply upon the presence within the forum of property, both maritime and non-maritime, belonging to the defendant." Joseph J. Kalo, THE MEANING OF CONTACT AND MINIMUM NATIONAL CONTACTS: REFLECTIONS ON ADMIRALTY IN REM AND QUASI IN REM JURISDICTION, 59 TUL. L. REV. 24, 67 (1984) (citations omitted). Here the contacts are far greater than the mere presence of property. The substantial and continuous operations of this nonresident in the United States and its prior litigation totally undermine any contention that Central never expected to be sued in the United States. Further, the effect of Central's actions in this case had tremendous impact on SSI and its operations in the United States. It is constitutionally fair and just to subject Central to suit in the United States.

In this case, the Fifth Circuit applied a standard that was more stringent than this Court's "minimum contacts" test. Central's "continuous and systematic" contacts with the United States, of which Central "purposefully availed" itself, gave it reasonable notice that it might be haled into a United States court. Central's multiple contacts with the United States make the exercise of jurisdiction over it both less burdensome and more reasonable. *See World-Wide Volkswagen*, 444 U.S. at 292. The Fifth Circuit applied a much different, higher and improper standard in its decision, which this Court has never before sanctioned.

CONCLUSION

Accordingly, petitioner respectfully prays for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

Michael H. Bagot, Jr.
Counsel of Record
Thomas A. Rayer, Jr.
WAGNER & BAGOT
650 Poydras Street, Suite 2660
New Orleans, Louisiana 70130
Telephone: (504) 525-2141
Facsimile: (504) 523-1587

David W. Stewart
BRYANT, CLARK, DUKES, BLAKESLEE, RAMSAY & HAMMOND, P.L.L.C.
2223 14TH Street
Gulfport, Mississippi 39501
Telephone: (228) 863-6101
Facsimile: (228) 863-9526

Counsel for Petitioner, Submersible Systems, Inc.

September 25, 1998

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION
CIVIL ACTION NO. 1:98cv251GR

SUBMERSIBLE SYSTEMS, INC.
PLAINTIFF

VS.

PERFORADORA CENTRAL, S.A. de C.V.
DEFENDANT

ORDER

This cause is before the Court on the motion to dismiss for lack of admiralty jurisdiction [21-1], the motion to dismiss for lack of personal jurisdiction [22-1], and the motion to dismiss for *forum non conveniens* [23-1], filed by the defendant, Perforadora Central, S.A. de C.V. [Perforadora], pursuant to Rule 12 of the Federal Rules of Civil Procedure. Also, before the Court is a motion for attachment pursuant to Rule B of the Federal Rules of Civil Procedure [6-1], or, in the alternative, a motion for attachment pursuant to Rule 64 of the Federal Rules of Civil Procedure and Mississippi Code Annotated section 11-31-[1], *et seq.* [6-1], filed by the plaintiff, Submersible Systems, Inc. [Submersible]. After due consideration of the evidence of record, the briefs of counsel, the applicable law, and being otherwise fully advised in the premises, the Court finds and orders as follows.

Perforadora, a Mexican corporation, entered into a contract with Quantum Incorporated [Quantum], another Mexican corporation, whereby Perforadora would supply a vessel in order for Quantum to perform oil related services. (Ct. R., Doc. 1, p. 3.) Quantum then subcontracted with Submersible Systems for underwater surveying services. (*Id.*0 Perforadora sent their boat and crew to Morgan City, Louisiana to transport Submersible's men and equipment into Mexican waters. (*Id.* at p. 4.) After roughly eight months of work, Perforadora terminated its contract with Quantum because Quantum fell behind in their payments to Perforadora. (*Id.*) Once the vessel docked on June 22, 1996, Perforadora allegedly seized Submersible's equipment without judicial process while the equipment was aboard Perforadora's vessel in retaliation against Quantum for the arrearages owed by Quantum to Perforadora. (*Id.* at p. 5.) Submersible subsequently brought suit for a Rule B attachment, or in the alternative, for a Federal Rule 64 attachment pursuant to state law of Perforadora's property located in Pascagoula, Mississippi, as a result of Perforadora's alleged "theft, piracy and/or conversion." (*Id.*)

Submersible has offered affidavits that Perforadora employees padlocked Submersible's equipment while the equipment was sitting aboard the vessel and Perforadora's crew members refused to allow a release of the equipment to Submersible's employees. (Pl.'s Resp., Exh. A, p. 2.) The Court finds that the alleged locality or situs of conversion occurred while Perforadora's vessel was located on water. *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972); *Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995). The Court further finds that an alleged conversion committed on navigable waters traditionally confers admiralty jurisdiction upon this Court.

The Lydia, 1 F.2d 18, 23 (2nd Cir. 1924); *Goodpasture, Inc. v. M/V Pollux*, 602 F.2d 84, 87 (5th Cir. 1979). Further, the Court finds that admiralty jurisdiction extends into Mexican territorial waters. *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113 (5th Cir. 1995); *Sevison v. Cruise Ship Tours, Inc.*, 1997 WL 530267, p. 6 (D.V.I. 1997). The Court therefore finds that admiralty and maritime jurisdiction exists for an alleged conversion that occurred over water.

The Court further finds that Submersible brought this action to recover damages from Perforadora's alleged conversion and not for the purposes of recovering the actual equipment that was seized. (Ct. R., Doc. 1.) Submersible has unsuccessfully attempted to reclaim their equipment through the Mexican court system with proof of ownership of the equipment. (Pl.'s Resp., Exh. B, p. 2.) Further, Perforadora submitted a brief to the Court explaining Mexican law on July 31, 1998, while using a forum shopping technique to supply an expert's opinion nearly a month after the fact. (Ct. R., Doc. 33.) Therefore, the Court finds that an alternate forum is not available to Submersible. *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 835 (5th Cir. 1993). The Court therefore finds that Perforadora's motion to dismiss on the basis of *forum non conveniens* should be denied.

Accordingly, a Rule B attachment can be accomplished only if Perforadora "cannot be found within the district" when Submersible initiated the action. Fed.R.Civ.P. B. "A defendant is present in the district if 1) the defendant can be found within the district in terms of jurisdiction, and 2) the defendant can be found within the district for service of process." *Heidmar, Inc. v. Anomina Ravennate Di Armamento SP.A. Of Ravenna*, 132 F.3d 264, 268 (5th Cir. 1998) (*citing LaBanca v. Ostermunchner*, 664 F.2d 65,67 (5th

Cir. 1981).)

The Court finds that Perforadora maintained an office with three employees at Halter Marine in Pascagoula, Mississippi, since September of 1997. (Ct. R., Doc. 25, p. 2.; Pl.'s Resp. Mot. Lack of Per. Juris., Exh. A.) The Court further finds that Submersible discovered a rig being constructed by a Mississippi corporation on behalf of Perforadora, but failed to investigate whether Perforadora had an office or employees located at the construction site. (Def.'s Resp. Supp. Mem., p. 7, Exh. A, pp. 107-109.) The Court finds that Perforadora has sufficient contacts within the State of Mississippi to confer personal jurisdiction. The Court further finds that Submersible did not diligently search for an office or employees of Perforadora in order to effect service. *Jarvis, An Introduction to Maritime Attachment Practice Under Rule B,* 20J. Mar. L. & Com. 521, 528, 531 ft. 31, 52 (1989). The Court therefore finds that Perforadora could be found within the district so as to nullify the basis for a Rule B attachment.

Pursuant to Rule 64 of the Federal Rules of Civil Procedure, Submersible can pursue an attachment under applicable state law. The Court finds that Submersible can attach Perforadora's property pursuant to Mississippi Code Annotated § 11-31-1, *et seq.*, provided that Submersible can place a bond with the Court in the amount of $1,000,000.00 as security. It is therefore,

ORDERED AND ADJUDGED that the defendant's motion to dismiss for lack of admiralty jurisdiction [21-1] be, and is hereby, denied. It is further,

ORDERED AND ADJUDGED that the defendant's motion to dismiss for lack of personal jurisdiction [22-1] be, and is hereby, denied. It is further,

ORDERED AND ADJUDGED that the defendant's motion to dismiss on *forum non conveniens* [23-1] be, and is hereby, denied. It is further,

ORDERED AND ADJUDGED that the plaintiff's motion for Rule B Attachment [6-1] be, and is hereby, denied. It is further,

ORDERED AND ADJUDGED that the plaintiff's motion for attachment pursuant to Rule 64 of the Federal Rules of Civil Procedure and Mississippi Code Annotated § 11-31-1, *et seq.*, [6-1] be, and is hereby, granted. It is further,

ORDERED AND ADJUDGED that the plaintiff post a $1,000,000 bond within ten days of the date of entry of this order, or by no later than October 5, 1998, in order to secure an attachment under Rule 64 of the Federal Rules of Civil Procedure and Mississippi Code Annotated § 11-31-1, *et seq.* It is further,

ORDERED AND ADJUDGED that this Court reserves the right to file a complete memorandum opinion on the motions above within a reasonable period of time.

SO ORDERED AND ADJUDGED this the 25th day of September, A.D., 1998.

/S/ WALTER J. GEX, III
UNITED STATES DISTRICT JUDGE

APPENDIX B

November 23, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION
CIVIL ACTION NO. 1:98cv251GR

SUBMERSIBLE SYSTEMS, INC.
PLAINTIFF

VS.

PERFORADORA CENTRAL, S.A. de C.V.
DEFENDANT

MEMORANDUM OPINION

This cause is before the Court on the motion to dismiss for lack of admiralty jurisdiction [21-1]; the motion to dismiss for lack of personal jurisdiction [22-1]; and the motion to dismiss for *forum non conveniens* [23-1]; all filed by the defendant, Perforadora Central, S.A. de C.V. [Perforadora], pursuant to Rule 12 of the Federal Rules of Civil Procedure. Also, before the Court is a motion for attachment [6-1] pursuant to Rule B of the Federal Rules of Civil Procedure, or, in the alternative, a motion for attachment [6-1] pursuant to Rule 64 of the Federal Rules of Civil Procedure and Mississippi Code Annotated § 11-31-1, *et seq.*, filed by the plaintiff, Submersible Systems, Inc. [Submersible]. After due consideration of the evidence of record, the briefs of counsel, the applicable law, and being otherwise fully advised in the premises, the Court finds as follows:

Statement of Facts

Perforadora, a Mexican corporation, entered into a contract with Quantum Incorporated [Quantum], another Mexican corporation, whereby Perforadora would supply a boat in order for Quantum to perform oil related work. (Ct. R., Doc. 1, p. 3; Def.'s Mot. to Dismiss Admiralty Juris., Exh. A.) Quantum subsequently subcontracted with Submersible, an American corporation, for underwater surveying services. (Ct. R., Doc. 1, p. 3.) Perforadora sent their boat and crew to Morgan City, Louisiana to transport Submersible's men and equipment into Mexican waters. (*Id.* at p. 4; Def.'s Motion to Dismiss Admiralty Juris., Correa Aff., p. 5.)

Quantum continually fell behind in payments to Perforadora for the use of Perforadora's vessel. (Def.'s Rebut. in support of Mot. to Dismiss Admiralty Juris., Exh. C, p. 106.) Perforadora's agent, Fausto Correa, stated that he threatened to shut down Quantum's operations on at least three occasions as a result of Quantum's sluggish payments. (Pl.'s Supp. Mem. in support of Attachment, Exh. A, p. 104.) After roughly eight months of work, Perforadora ultimately terminated its contract with Quantum on the basis of Quantum's deficient payments and because Perforadora contracted the vessel's use for another job. (Ct. R., Doc. 1, p. 4: Correa Aff., p. 6.) Once docked in the Port of Dos Bocas, Mexico on June 23, 1997, Perforadora allegedly seized Submersible's equipment without judicial process while the equipment was aboard Perforadora's boat in an alleged retaliation against Quantum for the arrearage owed by Quantum to Perforadora. (Ct. R., Doc. 1, p. 5; Pl.'s Supp. Mem. in support of Attachment, Exh. B, p. 3; Exh. C, p. 2.)

Specifically, Submersible's former employee, Michael Carlisle, stated that when he and his fellow co-worker, Willie Allen, awoke on June 23, 1997, their equipment was padlocked by Perforadora's employees aboard the deck of the vessel; that he and Allen were only allowed to retrieve their personal items; and that they were allegedly ordered to leave the vessel and told not to take Submersible's equipment. (Pl.'s Resp. to Def.'s Mot. to Dismiss Admiralty Juris., Exh. A, pp. 3-4.) Thereafter, Submersible's employee hitchhiked into a nearby town and notified Wolfgang Burnside, the President of Submersible, about the incident. (*Id.* at p. 4.) Submersible contends that the "tort occurred when Submersible's personnel were denied access to the [equipment] and instructed to leave the vessel without it." (Pl.'s Resp. to Def.'s Mot. to Dismiss Admiralty Juris., p. 6.) As further support, both Carlisle and Allen have asserted that the equipment was marked with Submersible's name and Submersible's rented equipment was marked"Welch."[1] (*Id.* at p. 4.)

Burnside appeared in Mexico on or about June 26, 1997, to retrieve his company's equipment. He was allegedly told by Correa at that time that the equipment was being held until Quantum paid the arrearage owed to Perforadora. (Def.'s Mot. to Dismiss Admiralty Juris., p. 4; Def.'s Rebut. in support of Mot. to Dismiss Admiralty Juris., Exh. B, pp. 82-83.)

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[1] Correa admits that Submersible's equipment was loaded in Morgan City, Louisiana and marked with big letters "Submersible Systems, Inc." and "Welch Rentals." (Correa Aff., p. 5; Pl.'s Resp. to Def.'s Mot. to Dismiss Admiralty Juris., Exh. B, pp. 71-72, 74-75, 115-116.)

Thereafter, on or about July 4, 1997, Perforadora's representative entered into negotiations with Quantum's representatives to resolve the financial dispute between them. (Pl.'s Resp. to Def.'s Mot. to Dismiss Admiralty Juris., Exhs. D-1, D-2, p. 2.) Perforadora admits through an interoffice memorandum from Correa dated July 7, 1997, in which Correa notifies his superior of the July 4, 1997, meeting, that it had possession of Submersible's equipment and that the equipment was being held until Quantum paid Perforadora for the past due services. (*Id.* at pp. 2-3.) The very next day, Perforadora loaded the equipment by boat and transported it to a land based warehouse in Carmen, Mexico. (Correa Aff., p. 6.)

On July 7, 1997, Burnside traveled to Carmen with a Quantum representative, Oscar Olivera, who reiterated that the equipment belonged to Submersible. (Correa Aff., p. 7.) Burnside was allowed to inspect the equipment which he discovered was stored outside and exposed to the elements. (Pl.'s Resp. to Def.'s Mot. to Dismiss on Forum Non Conveniens, Exh. A, p.5.) Once again he protested the wrongful seizure, and Correa testified that Burnside was allowed to remove incidental parts of the equipment at that time. (Correa Aff., p. 7; Def.'s Rebut. in support of Mot. to Dismiss Admiralty Juris., Exh. B, pp. 82-83.) Perforadora, however, retained the bulk of the equipment including the rented "Welch" equipment as apparent leverage for payment from Quantum. (*Id.*)

On or about August 8, 1997, after Perforadora had been notified repeatedly of ownership of the equipment, Perforadora placed the equipment with the Agente Del Ministerio Publico Del Fuero Comun Adscrito a La Primera Delegacion, and have maintained that the Mexican tribunal

must decide who owns the equipment. (Correa Aff., pp. 8, 10.) Burnside appeared with his Mexican attorney to protest the seizure and to show proof of ownership. (*Id.* at p. 9.) Even after showing proof of ownership, the Mexican court allowed Perforadora to retain the property as a depository apparently for Quantum's reluctance in paying the debt owed Perforadora. (*Id.*; Pl.'s Resp. to Def.'s Mot. to Dismiss Admiralty Juris., Exh. C, p. 7; Pl.'s Resp. to Def.'s Mot. to Dismiss on Forum Non Conveniens, Exh. B, p. 2.) Before bringing the instant action, Burnside attempted to regain the property for nearly a year in the Mexican system, but his attempts were futile. (Pl.'s Supp. Mem. in support of Attachment, Burnside Aff., p. 5.) Ironically, Perforadora maintains that it "has never claimed ownership of the equipment and has always been willing to turn it over to the true owner." (Correa Aff., p. 9.)

As a result of the alleged seizure of equipment, Submersible alleges that it has had to shut down its business. (Burnside Aff., p. 5.) Eight of nine employees have been released from employment; Submersible has had to pay Mexican tariffs on the property being located in Mexico longer than six months; and Submersible has had to continue to pay rental fees to Welch. (*Id.* at pp. 5-6.) Due to these losses, Submersible brings this action not to recover the property that was allegedly seized and is now worthless, but to seek damages and restitution for the alleged act of conversion, theft, or piracy committed by Perforadora on June 23, 1997. (Ct. R., Doc. 1, p. 5.)

Burnside discovered that Perforadora had entered into a contract with Halter Marine, Inc. [Halter], a Mississippi Corporation located in Pascagoula, Mississippi, whereby Halter would build an oil rig at a cost of roughly 65 million

dollars to Perforadora. (Def.'s Resp. to Pl.'s Supp. Mem. in support of Attachment, Exh. A, pp. 103, 105.) Burnside contacted Halter Marine to confirm the contract and was told that the rig was due for release at some point in 1999. (*Id.* at p. 104.) Thereafter, Submersible's counsel contacted the Mississippi Secretary of State and were informed that Perforadora was not registered to do business in Mississippi nor did they have a registered agent for service of process. (Pl.'s Rebut. in support of Attachment, p. 4.) The attorneys then checked the local phone directories and found no listing for Perforadora in the State of Mississippi. (*Id.*) Submersible subsequently brought suit in May of 1998 for attachment under Rule B of the Federal Rules of Civil Procedure, or in the alternative, Rule 64 of the Federal Rules of Civil Procedure of Perforadora's property located in Mississippi as a result of Perforadora's alleged "theft, piracy and/or conversion." (Ct. R., Doc. 1, p. 5.)

Perforadora, however, had three employees stationed in an office located at Halter since September of 1997. (Correa Aff., p. 2; Pl.'s Supp. Mem. in support of Attachment, Exh. E.) A phone list from Halter also indicates that two of Perforadora's employees were listed as "Owner Representatives," and Perforadora states that Alejandro Castro, a registered engineer, was the officer in charge. (Correa Aff., p. 2; Def.'s Resp. to Pl.'s Supp. Mem. in support of Attachment, Exh. B, pp. 21-22; Exh. C.) There is no indication that Burnside or his attorneys attempted to discover the whereabouts of any Perforadora employees or office located at Halter. (Def.'s Resp. to Pl.'s Supp. Mem. in support of Attachment, Exh. A, pp. 103-109.) After suit was filed and upon Perforadora discovering the lawsuit apparently through Halter, Perforadora appointed an agent for acceptance of process. (Pl.'s Supp. Mem. in support of Attachment,

Exh. E.)

Furthermore, Perforadora submitted a brief to the Court on July 31, 1998, in an attempt to explain Mexican law while using a forum shopping technique to supply an expert's opnion nearly a moth after the fact. (Ct. R., Doc. 33.) Specifically, Perforadora stated to the Court that:

> All parties can be brought within the jurisdiction of the Mexican court. Opinion of _____. Perforadora is a Mexican corporation that does business in Dos Bocas, Mexico and maintains its principal place of business in Mexico City, Mexico. As shown in the opinion of Mexican law expert, _____, the courts of Mexico are open to non-citizens such s SSI, who may in those courts seek redress for the alleged wrongdoing of both Perforadora and Quantum. If any sums remain due from Pemex to Quantum, those funds may be subject to attachment. Mexican law recognizes the tort of conversion and provides an adequate remedy. Opinion of _____, p. _____.

(Def.'s Mot. to Dismiss on Forum Non Conveniens, pp. 3-4.) The court notes that Perforadora was required to file the *forum non conveniens* motion by July 31, 1998, and that its Mexican legal expert was unable to deliver his opinion by that date. (*Id.* at p. 3.) The Court further notes, however, that Perforadora did not supply the name of its expert until August 21, 1998, at which time Perforadora submitted the opinion of Carlos R. Loperena pursuant to the Court's order. (Ct. R., Docs. 29, 33.)

Loperena testified that Mexican law allows Submersible a fair and reasonable opportunity to seek their equipment. (Def.'s Mot. to Dismiss on Forum Non Conveniens, Loperena Aff., pp. 3-4.) Further, Perforadora's expert after the fact testified that charges could be brought in Mexico for conversion or theft and that any such action would take no longer than 20 months to conclude.[2] (Loperena Aff., pp. 2,4.)

In sum, there was no contract between Perforadora and Submersible. The first action to retrieve the property began on August 8, 1997, when Burnside and his attorney presented proof of ownership to the Mexican tribunal. (Correa Aff., pp. 8-10.) Since then, the property remains in the hands of Perforadora as apparent collateral against Quantum. (*Id.* at p. 9; Pl.'s Resp. to Def.'s Mot. to Dismiss Admiralty Juris., Exh. C, p. 7.)

Standard of Review

A motion for lack of subject matter jurisdiction "should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of [its] claim that would entitle [it] to relief." *Home Builders Assoc. of Miss., Inc., v. City of Madison, Miss.*, 143 F.3d 1006, 1010 (5th Cir. 1998) (*citing Benton v. United States*, 960 F.2d 19, 21 (5th Cir. 1992).) The case can be properly dismissed for lack of subject matter jurisdiction if the Court lacks statutory or constitutional power to adjudicate the cause of action. *Id*

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[2] Submersible offers the affidavit of Enrique Garza who supplies the Court with the *criminal* act by which Perforadora could be held liable for theft or conversion. (Pl.'s Resp. to Def.'s Mot. to Dismiss Admiralty Juris., Exh. C, p. 10.)

(citation omitted). "When a nonresident defendant presents a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing the district court's jurisdiction over the nonresident." *Allred v. Moore & Peterson*, 117 F.3d 278, 281 (5th Cir. 1997) (citations omitted). Furthermore, a *forum non conveniens* determination is discretionary within the district court, and will be overruled only for abuse of discretion. *Command-Aire Corp., v. Ontario Mechanical Sales and Service Inc.*, 963 F.2d 90, 95 (5th Cir. 1992).

Legal Analysis

I. Subject Matter Jurisdiction

Federal maritime tort jurisdiction is defined by a two-party "locality-plus-nexus" test as follows: (1) "[t]he tort must have occurred on or over navigable waters," and (2) "the wrong alleged must 'bear a significant relationship to traditional maritime activity.'" *Gaspard v. Amerada Hess Corp.*, 13 F.3d 165, 167 (5th Cir. 1994) (*citing Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed. 2d 454 (1972).) [sic] The Court will separately analyze the situs test of whether the alleged acts occurred upon land or water and the nexus test of whether "theft, piracy, and/or conversion" of the transportation of cargo or equipment is a traditional maritime activity.

A. Situs/Locality Test

Perforadora contends that any alleged acts, if proven, occurred upon land because they unloaded the vessel's cargo pursuant to the charter entered into between Quantum and Perforadora. (Def.'s Mot. to Dismiss Admiralty Juris., p. 7,

Exhs. B, C, Part II, Clause 2(d).) Perforadora maintains that the right to unload the cargo was lawful. Correa testified, however, that "[w]hen the boat returned to Dos Bocas on June 23, 1997, no representatives of SSI or Quantum were present." (Correa Aff., p. 6.)

Perforadora's argument is in direct conflict with the sworn affidavits of Submersible's former employees, Michael Carlisle and Willie Allen. (Pl.'s Supp. Mem. in support of Attachment, Exh. B, pp. 3-4; Exh. C, p. 2.) A summation of Carlisle's testimony indicates that he and Allen were ordered to leave Perforadora's vessel and that they were not allowed to take Submersible's equipment that was on the deck and padlocked by Perforadora's employees. (*Id.* at Exh. B, pp. 3-4.) Furthermore, Submersible alleges in the complaint that, "[o]n or about June [23], [1997], plaintiff's equipment was seized by Perforadora without judicial process while aboard the DON FRANCISCO at the port in Dos Bocas, Mexico ostensibly as security for or in retaliation against Quantum for arrearages owed by Quantum to Perforadora." (Ct. R., Doc. 1, p.5.)

As a result of Submersible's description of how the property was moved from Dos Bocas to Carmen, Perforadora states that "[Submersible's] complaint alleges land-based torts and damages." (Def.'s Mot. to Dismiss Admiralty Juris., p. 8.) Perforadora attempts to persuade the Court that any alleged conversion could only have occurred after the property was located upon land. The Court does not agree. The Court finds that Submersible has presented sufficient proof and facts to warrant a finding that the alleged acts of conversion, theft, or piracy actually occurred over water.

Alternatively, Perforadora relies upon the argument that one of the reasons for locking up the equipment is because it was unsure whether the property belonged to Quantum or Submersible. (Def.'s Mot. to Dismiss Admiralty Juris., p. 4; Def.'s Rebut. in support of Mot. to Dismiss Admiralty Juris., Exh. B, pp. 106-107.) As support, the customs forms, as required by Mexican Law, listed Quantum as the importer of the equipment. (Ct. R., Doc. 25, Exh. G; Pl.'s Resp. to Def.'s Mot. to Dismiss on Forum Non Conveniens, Exh. C, pp. 6, 9.) Again, Submersible has sufficiently plead and presented facts to show that Perforadora was aware of the ownership of the equipment at all times. (Ct. R., Doc. 1, p. 6.)

Correa admitted that he sent Perforadora's vessel and crew to Morgan City, Louisiana to pick up Submersible's men and equipment, and that the equipment was clearly marked "Submersible Systems, Inc." and "Welch Rentals." (Correa Aff., p. 5; Pl.'s Resp. to Def.'s Mot. to Dismiss Admiralty Juris., Exh. B, pp. 71-72, 74-75, 115-116.) Furthermore, Perforadora and Correa allowed Submersible's employees to retrieve their personal belongings out of the equipment that was detained. (Pl.'s Resp. to Def.'s Mot. to Dismiss Admiralty Juris., Exh. A, pp. 3-4.)

Both Burnside and Allen state that Correa knew that the equipment belonged to Submersible, yet Perforadora retained possession as leverage against Quantum. (Def.'s Rebut. in support of Mot. to Dismiss Admiralty Juris., Exh. B, pp. 82-83; Pl.'s Supp. Mem. in support of Attachment, Exh. C, p. 2.) To further reiterate Perforadora's knowledge of ownership, the evidence indicates that Perforadora was notified of Submersible's ownership by Submersible's former employees on June 23, 1997, by Burnside on June 26, 1997,

by Quantum on July 4, 1997, and again by Burnside on July 7, 1997. (Pl.'s Resp. to Def.'s Mot. to Dismiss Admiralty Juris., Exh. A, pp. 3-4; Exhs. D-1, D-2, p. 2; Def.'s Rebut. in support of Mot. to Dismiss Admiralty Juris., Exh. B, pp. 82-83; Correa Aff., p. 7.) The most telling evidence is an interoffice memorandum written by Correa to his superiors referring to the July 4, 1997, meeting with Quantum officials in which Correa specifically states, "support equipment for inspection of submarine lines, property of Submersible Systems, Inc." (Pl.'s Resp. to Def.'s Mot. to Dismiss Admiralty Juris., Exhs. D-1, D-2, p.2.) The Court therefore finds Perforadora's lack of knowledge argument suspect, and that Submersible has sufficiently articulated that the alleged action took place upon water.

B. Nexus Relationship to Traditional Maritime Activity

Perforadora and Submersible did not have a contract for the transportation of Submersible's men or equipment, nor did the parties supply the Court with a bill of lading. Perforadora did contract, however, with Quantum to supply a vessel to transport Submersible's men and equipment into waters located outside Mexico. (Ct. R., Doc. 1, p. 3; Def.'s Mot. to Dismiss Admiralty Juris., Exh. A.) The United States Supreme Court sets out a two-part test concerning nexus relationship as follows: (1) "whether the incident has a potentially disruptive impact on maritime commerce;" and (2) whether "the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity." *Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995) (*quotation marks and internal citations omitted.*)

Perforadora argues that there is no disruptive impact on maritime commerce. (Def.'s Mot. to Dismiss Admiralty Juris., p. 10.) Perforadora reasons that this case does not involve the collision of vessels, goods under bills of lading, marine insurance, or personal injuries which are the usual bases for maritime law suits. (*Id.*) The Court, however, finds that there is a sufficient impact on maritime commerce occurring when underwater surveying equipment was allegedly converted to Perforadora's own use thereby: (1) preventing Submersible from completing other underwater surveying contracts; and (2) hindering Welch Rentals from further rentals of oceanographic equipment. Further, the Court finds that the carriage of equipment is similar to the carriage of goods under a bill of lading in that Perforadora contracted with Quantum to transport the equipment in question prior to the alleged location where the act of piracy was ultimately committed.

Concerning whether there is a substantial relationship to traditional maritime activity, Submersible offers support that conversion committed upon the high seas is a maritime activity. (Pl.'s Resp. to Def.'s Mot. to Dismiss Admiralty Juris., p. 7.) Specifically, the Second Circuit has stated, "[t]he reason for the exercise of admiralty jurisdiction is that conversion is a tort, and a tort so elementary in its nature that it may be maintained even against an infant (*Vasse v. Smith*, 6 Cranch, 226, 3 L.Ed. 207), and if that tort is committed on navigable waters, admiralty has jurisdiction." *The Lydia*, 1 F.2d 18, 23 (2nd Cir. 1924).

In a similar case, the seller of wheat contracted with a buyer, whereby the buyer chartered a third party to supply a vessel, POLLUX, for the carriage of the wheat to the buyer's destination. *Goodpasture, Inc. v. M/V Pollux*, 602 F.2d 84,

85 (5th Cir. 1979). After the third party vessel owner placed a maritime lien on the wheat located aboard the vessel, the Fifth Circuit stated, "whatever rights to payment for the use of the POLLUX [third party vessel owner] may have had against [buyer], did not run against [seller] or its wheat." (*Id.* at p. 87.) The Court found that the third party vessel owner committed conversion as a result of an "unlawful and wrongful exercise of dominion, ownership of control over the property of another, to the exclusion of the same rights by the owner." (*Id.*) (*citations omitted.*) Thus, even though Perforadora and Submersible did not have a bill of lading for the carriage of goods, Perforadora allegedly converted Submersible's equipment in retaliation against Quantum for the arrearages owed by Quantum to Perforadora. (Ct. R., Doc. 1, p. 5; Pl.'s Supp. Mem. in support of Attachment, Exh. B, p. 3; Exh. C, p. 2.)

Alternatively, Perforadora argues that underwater surveying of pipelines are collateral to the oil and gas industry and fall outside the admiralty jurisdiction of this Court. (Def.'s Mot. to Dismiss Admiralty Juris., p. 10.) (*citing Thurmond v. Delta Well Surveyors*, 836 F.2d 952, 955 (5th Cir. 1988).) The Courts, however, have continuously held that "[a]n agreement to transport people and supplies in a vessel to and from a well site on navigable waters is clearly a maritime contract." *Borden v. Amoco Coastwise Trading Co.*, 985 F. Supp. 692, 696 (S.D. Tex. 1997) (*citing Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223, 1231-1232 (5th Cir. 1985); *see also, Hale v. Co-Mar Offshore Corp.*, 588 F. Supp. 1212, 1215 (W.D. La. 1984); *Smith v. Pan Air Corp.*, 684 F.2d 1102, 1111 (5th Cir. 1982) ("transporting person[s] over the seas is a maritime-type function").)

In *Grubart*, 513 U.S. at 541, the Court found that "[t]he substantial relationship test is satisfied when at least one alleged tortfeasor was engaging in activity substantially related to traditional maritime activity and such activity is claimed to have been a proximate cause of the incident." The Court finds that Perforadora performed a traditional maritime activity of transporting Submersible's men and equipment much like the transportation of goods as described above, therefore, satisfying the substantial relationship test and conferring admiralty jurisdiction upon the Court.

Perforadora's final argument is that "the admiralty jurisdiction of the federal courts may not extend into the territorial waters of a foreign nation." (Def.'s Mot. to Dismiss Admiralty Juris., p. 12.) This proposition is simply not true. The Fifth Circuit has exercised jurisdiction over a personal injury action which occurred in the United Arab Emirates' territorial waters. *Coats v. Penrod Drilling*, 61 F.3d 1113 (5th Cir. 1995). Additionally, another court has held:

> [t]he term 'navigable waters' is not anywhere expressly limited to the navigable territorial waters of the United States and the high seas...The fact that the navigable waters at issue here are not within the territorial waters of the United States but are foreign territorial waters is only relevant to the determination of whether U.S. maritime law should be applied, not whether the tort is a maritime tort.

Sevison v. Cruise Ship Tours, Inc., 1997 WL 530267, p. 6 (D.V.I. 1997). That court rejected the proposition that foreign territorial waters are outside the federal court's

admiralty jurisdiction but found the fact relevant concerning what law should be applied. (*Id.*) The Court therefore finds that admiralty jurisdiction may extend into territorial waters of foreign nations. The Court further finds that Perforadora's motion to dismiss for lack of admiralty jurisdiction should be denied.

II. *Forum Non Conveniens*

The United States Supreme Court has stated, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil v. Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 843 (1947). There are three steps in a *forum non conveniens* analysis. *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 835 (5th Cir. 1993) The first step is whether there is an alternate forum. (*Id. citing Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981).) If so, then the second and third steps involve an evaluation of private and public interest factors. (*Baumgart*, 981 F.2d at pp. 835-837.)

Additionally, Perforadora bears the burden of persuasion which extends to all the elements of the *forum non conveniens* analysis. *In re Air Crash Disaster Near New Orleans, La. v. Pan American World Airways, Inc.*, 821 F.2d 1147, 1164 (5th Cir. 1987), *vacated on other grounds, Pan Am. World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989). If Perforadora meets its initial burden of establishing an adequate and available forum, then it must prove that the "private and public interests weigh heavily on the side of trial in the foreign form." (*Id.*) Consequently, Perforadora "must provide enough information to enable the district court to balance the parties interest." (*Id.* at p. 1165 *citing Reyno*, 454 U.S. at p. 258.) The alternate forum, private interest, and public interest

factors are individually analyzed below.

A. Alternate Forum

For an alternate forum to be feasible, it must be both available and adequate. (*Baumgart*, 981 F.2d at p. 835.)

> A foreign forum is available when the entire case and all parties can come within the jurisdiction of that forum...A foreign forum is adequate when the parties will not be deprived of all remedies or treated unfairly...even though they may not enjoy the same benefits as they might receive in an American court.

(*Id. citing In re Air Crash*, 821 F.2d at p. 1165.) The United States Supreme Court further states, "if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice." (*Reyno*, 454 U.S. at p. 254.)

1. Available Forum

"The defendant's submission to the jurisdiction of an alternative forum renders that forum available for purposes of forum non conveniens analysis." *Quintero v. Klaveness Ship Lines*, 914 F.2d 717, 728 (5th Cir. 1990) (*citations omitted.*) As a result of Perforadora's residence in Mexico and their arguments that Mexican law is applicable, Perforadora is apparently willing to submit to the jurisdiction of the Mexican courts. (Def.'s Mot. to Dismiss on Forum Non Conveniens, pp. 3–4.) Perforadora's expert, Loperena, claims that the

courts in Mexico have the authority and power to subpoena all of the witnesses located in Mexico under Articles 1261 and 1262 of the Mexican Code of Commerce. Loperena further provides the Court with the relevant provisions. (Loperena Aff., pp. 2-3.) The Court therefore finds that an alternate forum is available.

2. Adequate Forum

Perforadora continually asserts that the equipment in question has been turned over to the Public Attorney and, as a result, Mexico is the proper forum to resolve any dispute over the ownership of the equipment. (Loperena Aff., pp. 3-4; Correa Aff., pp. 8-9.) As previously stated, Submersible attempted to regain its property through the Mexican court system. Because Submersible's efforts were to no avail even after showing proof of ownership, and even though Perforadora had knowledge of the true ownership, Submersible brought this action. (Pl.'s Resp. to Def.'s Mot. to Dismiss on Forum Non Conveniens, Exh. B, p. 2; Correa Aff., pp. 8-9; Ct. R., Doc. 1.)

Perforadora made the blind assertion on July 31, 1998, that "Mexican law recognizes the tort of conversion and provides an adequate remedy." (Def.'s Mot. to Dismiss on Forum Non Conveniens, p. 4.) In support, Loperena makes a general conclusion that "the laws of Mexico provide for recovery for 'theft, conversion or piracy' in the event such claims could be proved" and that "SSI...would have an adequate remedy under Mexican law." (Loperena Aff., p. 4.) Perforadora, however, fails to provide the Court with applicable provisions under Mexican law which purport to allow Submersible a civil action for "theft, piracy, and/or conversion."

On the other hand, Submersible offers the declaration of their legal expert, Enrique Garza, who supplies the Court with the criminal act by which Perforadora could be held liable for theft. (Pl.'s Resp. to Def.'s Mot. to Dismiss on Forum Non Conveniens, Exh. B.) The Court finds that a criminal remedy is clearly inadequate, effectively leaving Submersible with no remedy at all. (*See Piper*, 454 U.S. at p. 254 n. 22 *citing Phoenix Canada Oil Co. Ltd. v. Texaco, Inc.*, 78 F.R.D. 445 (Del. 1978).)

The Court finds that Perforadora has failed to establish that the Mexican court system would provide an adequate civil remedy of recovery to Submersible. The Court further finds that an adequate alternate forum does not exist and the defendant's motion for *forum non conveniens* should be denied. In an abundance of caution, however, the Court will address and balance the relevant factors of public and private interests in order to avoid the examples of abuse of discretion as outlined by the Fifth Circuit. (*In re Air Crash*, 821 F.2d 1147 at pp. 1166-1167.)

B. Private Interests

"If the court determines that there is an available and adequate forum, then the court must consider the private interest factors." (*Quintero*, 914 F.2d at p. 727.) The factors include: "(1) the relative ease of access to sources of proof; (2) the availability of compulsory process for attendance of unwilling, and the costs of obtaining attendance of willing, witnesses; (3) probability of an opportunity to view the premises, if view would be appropriate to the action; and (4) other factors affecting the ease, speed, and expense of trial or the enforceability of a judgment if obtained. (*Baumgart*, 981

F.2d at pp. 835-836 *citing Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).) To the list, the Fifth Circuit has added that deference to be given to the plaintiff's choice of forum. (*In re Air Crash*, 821 F.2d at p. 1165.)

Perforadora maintains that the action occurred in Mexico; that possible witnesses from Quantum, the Mexican Department of Customs, and Pemex[3] are located in Mexico; and that documents and the equipment in question are in Mexico. (Def.'s Mot. to Dismiss on Forum Non Conveniens, p. 5.) Submersible, however, claims that testimony by Pemex employees is not needed because the relationship between Quantum and Pemex has no bearing on the claim of Submersible against Perforadora. (Pl.'s Resp. to Def.'s Mot. to Dismiss on Forum Non Conveniens, p. 6.) Submersible further argues that testimony of Mexican custom officials is unnecessary because the custom documents have already been produced to the Court and the legal experts have attested to their relevance. (*Id.*) Most importantly, Correa stated that the relevant Quantum representatives are nowhere to be found even though they allegedly reside in Mexico. (*Id.* at Exh. D, pp. 111-112; Correa Aff., pp. 10-11.)

Perforadora's only independent witness, Nicolas Morales, is a third-arty marine agent who represented Quantum in Mexico. (Def.'s Mot. to Dismiss on Forum Non Conveniens, p. 5.) Submersible submits that any Mexican witness that may not be available to give depositions or trial testimony in the United States, "can be required to give testimony in Mexico by Letters Rogatory as per the Inter-American convention on the Taking of Evidence Abroad

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[3] Pemex is a Mexican government owned oil company for which Quantum was working.

which was ratified by Mexico." (Pl.'s Resp. to Def.'s Mot. to Dismiss on Forum Non Conveniens, p. 11; Loperena Aff., p. 2.) Submersible's independent witnesses include their former employees, Allen and Carlisle, who are willing to travel to a United States court, and Welch employees who are located in the United States. (Pl.'s Resp. to Def.'s Mot. to Dismiss on Forum Non Conveniens, pp. 4-5; Exh. B, p. 2.) In further support, there is no indication that any outstanding documents are not within the control of the Court. The Court, therefore, finds that the relative ease of access to sources of proof favor Submersible.

Concerning the second factor, Perforadora argues that witnesses not employed by Perforadora or Submersible, and hence not subject to the control of the parties, will be needed to testify at trial.[4] (Def.'s Mot. to Dismiss on Forum Non Conveniens, p. 5.) Both Mexico and the United States courts have the power to compel witnesses only in their respective jurisdictions. As noted above, Perforadora's possible independent witnesses are either irrelevant, cannot be found, or could be deposed in Mexico pursuant to the process described above. Considering Submersible's former employees apparent reluctance to travel to a Mexican court and the possibility of discovering the whereabouts of the Quantum witnesses, the Court finds that the compulsory process factor is neutral on behalf of both parties.

The Court finds the need to view the premises irrelevant because the equipment was either seized and

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[4] Specifically, Perforadora continues to maintain that Pemex employees, custom officials, and former Quantum employees who cannot be found, are possible witnesses whom neither party can compel to testify. (*Id.* at p. 6.)

converted while aboard Perforadora's vessel or it was not. Any possible argument of a need to view the equipment is only relevant to mitigation of damages in the unlikely probability that Submersible's equipment is eventually returned. Upon the unforseen return of the equipment, the calculation of damages could be provided to the Court by experts. The Court finds the third factor neutral.

Perforadora contends that the ease, speed, and expense of trial are less burdened in Mexico on two bases: (1) Perforadora's inability to implead Quantum as a third party, and (2) the cost of obtaining and translating evidence. (Def.'s Mot. to Dismiss on Forum Non Conveniens, pp. 6-7.) Perforadora reasons that a Mexican court can implead Quantum with "[t]he possibility of attaching any amounts due to Quantum by Pemex, or of attaching other property of Quantum located in Mexico." (*Id.*)

As previously stated, the present action by Submersible is against Perforadora for the alleged conversion that occurred on June 23, 1997, and is not an action to recover the equipment itself; nor is this an action to recover any amounts from Quantum by either party. Perforadora's inclusion of Quantum for the purposes of obtaining a possible judgment for the unpaid amount owed by Quantum to Perforadora has no bearing on whether Perforadora committed an admiralty tort against Submersible. The Court finds that Quantum is not a necessary third party for the purposes of this action which would affect the ease, speed, and expense of this trial.

Concerning the translation of testimony and evidence from Spanish into English, the proof shows that custom and court documents have already been translated into English and that Correa has already testified in English. (Ct. R., Doc. 25,

Exhs. A--H-5; Correa Aff., p. 3; Pl.'s Resp. to Def.'s Mot. to Dismiss on Forum Non Conveniens, Exh. D.) Translation would be needed to facilitate Submersible in either a Mexican or United States court while Correa is apparently fluent in English and will be acting on behalf of Perforadora at a trial in this court. (Pl.'s Resp. to Def.'s Mot. to Dismiss on Forum Non Conveniens, p. 13; Correa Aff., p. 3.)

Perforadora offers cases where the courts have found the need for translation overwhelming, however, this Court finds that the only translation required would be of Perforadora's possible Spanish speaking witnesses. Consequently, the Court finds that while translation from Spanish to English will affect the expense and speed of trial, the factor favors Submersible.

Perforadora does not address the factor that Submersible could obtain an attachment in Mississippi as is the case in Mexico, if a judgment were obtained in the jurisdiction of the Untied States or Mexican courts, respectively. (Loperena Aff., p. 3.) Perforadora has property located in both Pascagoula Mississippi, and has its principal place of business in Mexico City, Mexico. (Def.'s Mot. to Dismiss on Forum Non Conveniens, pp. 1-3.) Furthermore, the Court finds that there is a strong presumption in favor of Submersible's choice of forum as a result of it being an American corporation. (*See Baumgart*, 981 F.2d at p. 836 n. 12 *citing Reyno*, 454 U.S. at p. 256.) The Court finds that the private factors are either neutral or favor Submersible.

C. Public Interest Factors

If the private interests do not favor dismissal, the Court is mandated to consider the public interest factors.

Empresa Lineas Maritimas v. Schihau-Unterweser, 955 F.2d 368, 376 (5th Cir. 1992) (*citing In re Air crash*, 821 F.2d at p. 1165.) As noted above, however, the Court finds that an alternative and adequate forum does not exist in addition to the private interest factors favoring Submersible. The Court will nevertheless consider the public interest factors which include: "(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized controversies resolved at home; (3) the interest in having the trial of a diversity case in the forum that is familiar with the law that must govern the action; (4) the avoidance of unnecessary problems in conflicts of law, or in application of foreign law; and (5) the unfairness of burdening citizens in an unrelated forum with jury duty." (*Baumgart*, 981 F.2d at p. 827 *citing In re Air Crash*, 821 F.2d at pp. 1162-1163; *citing Gulf Oil*, 330 U.S. at p. 508.)

Perforadora asserts that the Mexican forum is not congested and could handle this matter in an expeditious manner. (Def.'s Mot. to Dismiss on Forum non Conveniens, p. 8.) Specifically, Loperena is of the opinion that an average commercial case in Mexico would take no longer that 20 months to conclude. (Loperena Aff., p. 2.) The Court, however, finds that the docket in the Southern District of Mississippi is no more congested than the docket of any Mexican tribunal and that the case can be heard in this Court by no later February of 1999. The Court therefore finds that the administrative factor favors Submersible.

Concerning the local interest factor, Perforadora argues that the events occurred in Mexican territorial waters and that most of its witnesses reside in Mexico, thereby justifying having the controversy resolved in Mexico. (Def.'s Mot. to Dismiss on Forum Non Conveniens, p. 9.)

Perforadora goes on to state, "Mexican courts have an even greater interest in assessing the liability, if any of Perforadora given the *potential criminal allegations* of conversion alleged by [Submersible]." (*Id.*) (emphasis added.) Perforadora's assertion that Submersible has the option of brining criminal charges against Perforadora only reiterates the proposition that this Court has previously made: that there is no adequate forum in Mexico to address the civil remedy of conversion for which Submersible brings this action. While the actions may have occurred in Mexican territorial waters, there is no local interest in having the dispute resolved in Mexico and there is a strong interest for the Untied States in ensuring that its citizens are compensated for harms done to them. (*See Baumgart*, 981 F.2d at p. 837 n. 15.)

"Choice of law is one of the *Gulf Oil* public interest factors; therefore choice of law is an integral part of the *forum non conveniens* determination." 1 THOMAS J. SCHOENBAUM, ADMIRALTY & MARITIME LAW § 6-13 at pp. 284-285 (2d ed. 1994); (*See also Gonzalez v. Naviera Neptuno A.A.*, 832 F.2d 876, 880 (5th Cir. 1987).) In order to determine the third and fourth public factors described above, the choice of law must first be determined. Under the *Lauritzen-Rhoditis*[5] test, the following factors are to be considered: "(1) the place of the wrongful act, (2) the law of the flag; (3) allegiance or domicile of the injured party; (4) allegiance of the ship owner; (5) place of contract; (6) accessibility of a foreign forum; (7) law of the forum; (8) shipowner's base operations." (*Quintero*, 914 F.2d at p. 730.)

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[5] The test is derived from *Lauritzen v. Larsen*, 345 U.S. 571 (1953) and *Hellenic Lines v. Rhoditis*, 398 U.S. 306 (1970), and initially applied to actions involving injuries to foreign seaman under the Jones Act.

The act allegedly occurred in Mexican territorial waters while aboard a Mexican owned vessel bearing a Mexican flag with its principal base of operations in Mexico City, Mexico. (Def.'s Mot. to Dismiss on Forum Non Conveniens, pp. 3, 10-11.) The neutral factor is that there is no contract between the parties. As the injured party, Submersible's allegiance is to the United States. As previously stated above, the law of the Mexican forum is totally inadequate to the action complained of, thereby, alienating the accessibility of a foreign forum. The Court therefore finds that American maritime law should apply where the parties have not contracted to submit to an alternate forum and the appropriate law is that of the United States.

The final public interest factor is inapplicable because no jury trial has been prayed for and this cause of action is to be decided by the Court. (Ct. R., Doc. 1.) The Court finds that the public interest factors favor Submersible. As a result of an inadequate alternate forum and both the private and public interest factors favoring Submersible, the Court finds that Perforadora's motion for *forum non conveniens* should be denied and jurisdiction should be retained by the Court.

III. Rule B Attachment

As a result of the Court having admiralty jurisdiction, Submersible seeks a Rule B attachment of Perforadora's property located in Mississippi in order to satisfy any possible judgment that may be granted and because Perforadora's oil rig is due for completion in April of 1999. (Ct. R., Doc. 6.) Rule B of the Federal Rules of Civil Procedure Supplemental Rules for Certain Admiralty and Maritime Claims provides:

With respect to any admiralty or maritime claim

> in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees to be named in the process to the amount sued for, if the defendant shall not be found within the district. Such a complaint shall be accompanied by an affidavit signed by the plaintiff or the plaintiff's attorney that, to the affiant's knowledge, or to the best of the affiant's information and belief, the defendant cannot be found within the district. The verified complaint and affidavit shall be reviewed by the court and, if the conditions set forth in this rule appear to exist, an order so stating and authorizing process of attachment and garnishment shall issue.

(FED. R. CIV. P. B.) Rule B essential applies in cases where a maritime lien exists for a maritime tort which would support an *in personam* claim against the defendant when the defendant is not found within the district, but has property within the district. *See Jarvis, An Introduction to Maritime Attachment Practice Under Rule B*, 20 J. Mar. L. & Com. 521, 526-530 (1989).

As previously stated, Perforadora's property is located at Halter. (Ct. R., Doc. 1.) A Rule B attachment, however, can be granted only if Perforadora "cannot be found within the district" when Submersible initiated the action. *Hiedmar, Inc. v. Anomina Ravennate Di Armamento SP.A. Of Ravena*, 132 F.3d 264, 268 (5th Cir. 1998). "A defendant is present in the district if 1) the defendant can be found within the district in terms of jurisdiction, and 2) the defendant can be found within the district for service of process." (*Id. citing LaBanca v. Ostermunchner*, 664 F.2d 65, 67 (5th Cir. 1981).) "If the

answer to both questions is affirmative, then the defendant can be found "within the district" for the purposes of Rule B (1), and the process of attachment and garnishment is not available to the plaintiff." (*Id.* at p. 267.) Due to Perforadora's motion to dismiss for lack of personal jurisdiction and its relation to the first requirement cited above, the Court will discuss the two requirements separately.

A. Personal Jurisdiction

Perforadora contradicts itself in an attempt to escape a Rule B attachment by claiming that it is "present" within the state while maintaining that the Court lacks personal jurisdiction for state purposes. (Def.'s Resp. to Pl.'s Supp. Mem. in support of Attachment, p. 6; Def.'s Mot. to Dismiss Personal Juris., pp. 5, 9-10.) Perforadora admits that "the presence of the rig in the district itself is sufficient to satisfy general personal jurisdiction in the district for purposes of Rule B." (Def.'s Resp. to Pl.'s Supp. Mem. in support of Attachment, p. 6.) Perforadora, however, maintains that "Rule B is not subject to common law due process constraints." (*Id.*)

In order to resolve any doubt, the Mississippi minimum contacts statute for nonresident defendants provides:

> Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the Constitution and laws of this state as to doing business herein, who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state, or who shall commit a tort in whole or in part in this state against a resident or

> nonresident of this state, or who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi and shall thereby be subjected to the jurisdiction of the courts of this state.

MISS. CODE ANN. § 13-3-57. As previously discussed, Perforadora is doing business within Mississippi by paying a Mississippi corporation for the construction of an oil rig, by providing three full-time employees for oversight of that project, and by maintaining an office in Pascagoula since September of 1997. (Correa Aff., p. 2; Pl.'s Supp. Mem. in support of Attachment, Exh. E.)

Additionally, Perforadora stated that they are "present within the Southern District of Mississippi by virtue of an office located at the Halter Marine shipyard in Pascagoula." (Pl.'s Resp. to Def.'s Mot. to Dismiss Personal Juris., Exh. A.) The Court finds that Perforadora maintains sufficient contacts with Mississippi so as to be "found within the district." Alternatively, the Court finds that the contacts confer personal jurisdiction in the subsequent event that a state law attachment is granted. The Court therefore finds that Perforadora's motion to dismiss for lack of personal jurisdiction should be denied.

B. Service of Process

In the memorandums of law provided to the Court, Submersible mentions that its counsel conducted a search for Perforadora in the State of Mississippi and were informed that: (1) Perforadora had no phone listing in either the 228 or 601 area codes; (2) that Perforadora was not licensed to do

business in the State of Mississippi; (3) that Perforadora had no agent for service of process appointed within the state; and (4) that Perforadora did not maintain an office within the Southern District of Mississippi. (Pl.'s Rebut. in support of Attachment, p. 4; Pl.'s Supp. Mem. in support of Attachment, pp. 3-4.) After a careful review of the record, the Court finds that Submersible inadvertently failed to file an affidavit in the Court record verifying that the defendant could not be found within the district. Submersible consistently refers to the affidavit of Michael H. Bagot, Jr., one of the attorneys representing Submersible, allegedly filed on March 27, 1998, in connection with the complaint. *(Id.)* Because Rule B requires an affidavit in the record, and there being no affidavit found, the Court finds that a Rule B attachment should be denied.

Alternatively, even with an appropriate affidavit, Submersible's motion for a Rule B attachment must fail. Perforadora must be "susceptible to service" in order to be found within the district. (*LaBanca*, 664 F.2d at p. 68.) Rule 4(h) of the Federal Rules of Civil Procedure provides that service upon a corporation may be made by "delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process." (FED. R. CIV. P. 4(h)(1).) The Fifth Circuit has stated, "[i]f a corporation's business is so substantial as to render the corporation amenable to suit in the state, its principal agent in charge of activities within that state meets the test of a 'managing agent.'" *Lone Star Package Car Co., Inc. v. Baltimore & O.R. Co.*, 212 F.2d 147, 152 (5th Cir. 1954); (*See also, Seawind Compania, S. A. v. Crescent Line, Inc.*, 320 F.2d 580, 582-583 (2nd Cir. 1963).)

Perforadora maintains that its chief operating engineer, Castro, is the officer in charge of the construction at Halter and that he resides in South Mississippi. (Correa Aff., p. 2; Def.'s Resp. to Pl.'s Supp. Mem. in support of Attachment, Exh. B, pp. 21-22.) Because the Court finds that personal jurisdiction exists over Perforadora, it follows that the Court finds that Castro was a managing agent within the meaning provided by Rule 4(h) and *Lone Star*.

Even though Submersible discovered a rig being constructed by a Mississippi corporation on behalf of Perforadora, Submersible and its counsel failed to diligently search for an office or employees of Perforadora located within the state in order to effect service. (Def.'s Resp. to Pl.'s Supp. Mem. in support of Attachment, p. 7, Exh. A, pp. 103-109; *See Jarvis*, 20 J. Mar. L. & Com. 521 at pp. 521, 531 n. 31, 52 (1989); *United States of America v. CIA. Naviera Continental S.A.*, 178 F. Supp. 561, 565 (S.D.N.Y. 1959).) If Submersible had diligently searched, the Court finds that it would have discovered that Perforadora was within the district in order to serve process through Castro. The Court therefore finds that Submersible 's motion for a Rule B attachment should be denied.

The argument proposed by Submersible, however, is that Perforadora appointed an agent for service of process on June 10, 1998, after the suit was filed. (Pl.'s Supp. Mem. in support of Attachment, p. 6; Exh. E, p. 1.) They analogize a Fifth Circuit case where the defendant appointed an agent for service of process within 15 minutes of the complaint being filed; the Court reasoned that the sole purpose was to defeat a Rule B attachment. (*Heidmar,* 132 F.3d at p. 268.) The distinguishing difference, as discussed above, is that Perforadora actually had an agent who could have been served

with process on the date that Submersible filed the complaint. The Court therefore finds that Submersible's argument is without merit.

IV. Federal Rule 64/State Law Attachment

Submersible alternatively moved for an attachment under state law pursuant to Rule 64 of the Federal Rules of Civil Procedure. (Ct. R., Doc. 6.) Rule 64 allows the Court to use state law where the district court is held in order to grant an attachment of collateral for any possible judgment to Submersible. (FED. R. CIV. P. 64.) The relevant state law provisions for attachment of a nonresident defendant is Mississippi Code Annotated § 11-31-1, *et seq.* The conversion of the equipment in question is allegedly worth $600,000 and Submersible's suit for damages is $3,500,000. (Ct. R., Doc. 1.) The Court therefore finds that Submersible can attach Perforadora's property pursuant to state law upon proper application to the Court and the posting of a $1,000,000 bond.

Conclusion

For the above reasons, the Court finds that Submersible has successfully alleged conversion of equipment committed over navigable waters thereby conferring admiralty jurisdiction upon the Court. Further, the Court finds that an adequate alternative forum does not exist, and that both private and public interest factors favor Submersible. The Court further finds that Perforadora could be found within the district which nullifies a Rule B attachment, because personal jurisdiction exists over Perforadora and the fact that Perforadora's managing agent could have accepted process on behalf of Perforadora at the time the suit was filed by

Submersible. The Court also finds that Submersible can attach Perforadora's property pursuant to state law upon proper application to the Court and the positing of a $1,000,000 bond.

The Court therefore finds that Perforadora's motions to dismiss for lack of admiralty jurisdiction, lack of personal matter jurisdiction, and *forum non conveniens* should be denied. The Court further finds that Submersible's motion for a Rule B attachment should be denied and that Submersible's motion for a Rule 64 attachment pursuant to state law should be granted upon proper application to the Court.

A separate Order in accordance with this Memorandum Opinion shall issue this date

DATED this the 23rd day of November, A.D., 1998

/S/ WALTER J. GEX, III
UNITED STATES DISTRICT JUDGE

APPENDIX C

November 23, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

CIVIL ACTION NO. 1:98cv251GR

SUBMERSIBLE SYSTEMS, INC.
PLAINTIFF

VS.

PERFORADORA CENTRAL, S.A. de C.V.
DEFENDANT

ORDER

This cause comes before the Court on the motion to dismiss for lack of admiralty jurisdiction [21-1]; the motion to dismiss for lack of personal jurisdiction [22-1]; and the motion to dismiss for *forum non conveniens* [23-1]; all filed by the defendant, Perforadora Central, S.A. de C.V. [Perforadora], pursuant to Rule 12 of the Federal Rules of Civil Procedure. Also, before the Court is a motion for attachment [6-1] pursuant to Rule B of the Federal Rules of Civil Procedure, or, in the alternative, a motion for attachment [6-1] pursuant to Rule 64 of the Federal Rules of Civil Procedure and Mississippi Code Annotated § 11-31-1, *et seq.*, filed by the plaintiff, Submersible Systems, Inc. [Submersible]. Pursuant to the Memorandum Opinion entered in this cause, this date, incorporated herein by reference, it is hereby,

ORDERED AND ADJUDGED that the defendant's motion to dismiss for lack of admiralty jurisdiction [21-1] be, and is hereby, denied. It is further,

ORDERED AND ADJUDGED that the defendant's motion to dismiss for lack of personal jurisdiction [22-1] be, and is hereby, denied. It is further,

ORDERED AND ADJUDGED that the defendant's motion to dismiss for *forum non conveniens* [23-1] be, and is hereby, denied. It is further,

ORDERED AND ADJUDGED that the plaintiff's motion for Federal Rule B Attachment [6-1] be, and is hereby, denied. It is further,

ORDERED AND ADJUDGED that the plaintiff's motion for attachment pursuant to Rule 64 of the Federal Rules of Civil Procedure and Mississippi Code Annotated § 11-31-1, *et seq.*, [6-1] be, and is hereby, granted. It is further,

ORDERED AND ADJUDGED that the plaintiff must post a $1,000,000 bond in order to secure an attachment under Rule 64 of the Federal Rules of Civil Procedure and Mississippi Code Annotated § 11-31-1, *et seq.*

SO ORDERED AND ADJUDGED this the 23rd day of November, A.D., 1998.

/S/ WALTER J. GEX, III
UNITED STATES DISTRICT JUDGE

APPENDIX D

July 19, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

CIVIL ACTION NO. 1:98cv251GR

SUBMERSIBLE SYSTEMS, INC.
PLAINTIFF

VS.

PERFORADORA CENTRAL, S.A. de C.V.
DEFENDANT

BENCH OPINION

This cause came on for trial before the Court without a jury on June 14, 1999. Shortly thereafter, the parties submitted proposed findings of fact and conclusions of law to the Court. The Court, having fully considered the testimonial and documentary evidence presented by both parties at trial, the arguments of counsel, the applicable law, and being otherwise fully advised in the premises, makes the following findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

Findings of Fact

I. General Background

The plaintiff, Submersible Systems, Inc. [SSI], is a Louisiana corporation[1] that owns and operates remotely operated vehicles [ROV], small unmanned submarine type vehicles used for underwater inspection, surveying and light construction. (Tr., pp. 25-28, 64-65.) During September of 1996, Quantum Ingenieros S.A. de C.V. [Quantum], a Mexican corporation, entered into an agreement with Petroleos Mexicanos [Pemex], the Mexican national oil company, for the survey and inspection of Pemex's pipelines in the territorial waters of Mexico. (Tr., pp. 28, 89-90, 100.) In order to perform the contract, Quantum entered into a service agreement with SSI to provide ROVs, including the personnel to operate and maintain them. (Jt. Exh. J-3.) Quantum subsequently time-chartered the M/V DON FRANCISCO and its personnel from the defendant, Perforadora Central, S.A. de C.V. [Perforadora], another Mexican corporation, to serve as the support vessel for the oil related work. (Def.'s Exh. D-25.)

The charter between Quantum and Perforadora commenced on or about November 1, 1996, and was to originally terminate on or about February 7, 1997. (Tr., p. 587; Def.'s Exh. D-25.) On or about November 3, 1996, Perforadora's vessel arrived in Morgan City, Louisiana, to transport SSI's equipment and personnel to Carmen, Mexico, and eventually to the job site. (Tr., pp. 28-29, 92.) Three ROVs[2] belonging to SSI, as well as their respective support

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[1] SSI resumed operations in July of 1995 and is owned by Wolfgang Burnside and his wife, who reside in Louisiana (Tr., pp. 65, 84.)

[2] The three ROV's included the MAX ROV, the SEA OWL, and the TRITON. The MAX ROV and SEA OWL were both owned by SSI, and the TRITON was leased by SSI in order to partially perform

systems, including a work van, control vans, a generator and fuel tank,[3] were loaded aboard the vessel. (Tr., pp. 29-30, 92; Jt. Exh. J-4; Pl.'s Exh. P-3.) Additionally, seven of SSI's employees, including Burnside, boarded the vessel in Morgan City, Louisiana. (Tr., pp. 29-30, 97.) At that time, only employees of Perforadora and SSI were aboard the vessel. (*Id.*) During the trip to Carmen, Burnside explained how the ROVs worked to the captain of the vessel and informed him that SSI owned the equipment. (Tr., p. 98.)

Upon arrival in Carmen on November 7, 1996, Quantum placed its own control van, leased living quarters, and an additional crew of approximately 10 or 11 people aboard Perforadora's vessel. (Tr., pp. 588-90.) Notwithstanding that fact, the three companies, Perforadora, Quantum and Submersible, were easily distinguishable while aboard the vessel. Perforadora employees were [sic] blue coveralls and operated the vessel; Quantum employees wore gray overalls with a company logo and operated the survey equipment; and SSI employees wore red coveralls with a company logo and operated the ROV equipment. (Tr., pp. 31-32.) Moreover, SSI's equipment was clearly marked "SUBMERSIBLE SYSTEMS, INC."; the SSI containers were red, the same color as SSI's coveralls; and SSI's employees were the only foreigners on the vessel. (Tr., pp. 31-32, 91; Pl.'s Exhs. P-8-P-10.)

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the Quantum contract. (Tr., pp. 27, 110.) The SEA OWL was smaller than the MAX ROV and was used at the beginning of the Quantum contract. (Tr., p. 27.)

[3] The generator and fuel tank were leased by SSI from Welch Sales and Services, Inc. [Welch], another Louisiana corporation, and was clearly marked "Welch Rentals." (Tr., p. 92.) Welch also filed suit for damages against Perforadora and settled prior to trial.

While in Carmen, Fausto Correa, Perforadora's marine operations manager, boarded the vessel and inspected the ROV equipment. (Tr., p. 302.) At that time, Burnside introduced himself as owner of SSI and identified the equipment that belonged to SSI. (Tr., pp. 101-102.) Correa admitted that the SSI containers were painted red, were operated by foreigners wearing red coveralls, and that the equipment was marked with SSI's name. (Tr., pp. 295-298, 300-01.) Correa even boarded the vessel approximately ten times during the course of the contract between Perforadora and Quantum.[4] (Tr., p. 299.)

Quantum's representative also filled out customs importation documents on SSI's equipment upon the vessel's arrival in Carmen. (Def.'s Exhs. D-1-D-4.) In order to import equipment for use on a job within Mexico or its territorial waters under Article 106, Section 2, Subsection A, a Mexican corporation was required to be listed as one of the importers. (Tr., pp. 378-80, 412-13, 459.) As a result, both Quantum and SSI were listed as importers on the customs forms. (*Id.*) A Mexican corporation importing Mexican goods, however, could not import goods under the provisions cited in the custom forms. (Tr., pp. 378-80, 459.) Thus, it was impossible to conclude from the customs forms that Quantum owned the equipment. (Tr., pp. 379-80, 412-13, 459.) Upon completion of the customs process, SSI's equipment and personnel received temporary certificates allowing them to remain in Mexico for six months, or until May of 1997. (Def.'s Exhs. D-1-D-4; Tr., pp. 30, 378.)

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[4] No contract existed between Perforadora and SSI.

After Quantum's equipment and personnel were loaded aboard the vessel, the inspection of underwater oil lines began off the coast of Mexico, primarily in the Bay of Campeche. (Jt. Exh. J-2; Tr., p. 191.) On at least two occasions during the contract, Quantum fell behind on payments to Perforadora for the use of its vessel, thereby resulting in the vessel being recalled into port and the equipment aboard, including SSI's equipment, being padlocked by Perforadora in an attempt to extract payment from Quantum. (Tr., pp. 36-37, 109, 266-67,305-06.) Once Quantum paid its balance, the equipment would be released and the inspection of oil lines would resume. (Tr., p. 37, 109.) Other than those two occasions, the contract between Perforadora and Quantum continued without event. (Tr., pp. 37-38, 102.) Although the contract was initially scheduled to end in February of 1997, the contract between Perforadora and Quantum was extended to permit the inspection work to be finished. (Tr., pp. 585-86.)

During the contract between SSI and Quantum, SSI billed its services and Quantum paid them in moderation. Specifically, from November of 1996 through February of 1997, SSI billed Quantum $729,347.15 and Quantum paid $340,000. (Jt. Exh. J-11.) Thus, Quantum's net balance as of February 1, 1997, for services rendered prior to that time was $389,347.15. After that date, SSI invoiced Quantum at the beginning of each month for the services performed in the preceding month. (*Id.*) Beginning March 1, 1997, through July 1, 1997, Quantum was billed for services rendered in the total amount of $1,056,403.38. (Jt. Exhs. J-11, J-12.) Between February 19, 1997, and May 22, 1997, Quantum submitted payments on its account in the total amount of $725,000. (Jt. Exh. J-11.) Thus, Quantum paid SSI a total of $1,065,000 for services rendered during the contract. (*Id.*)

Because SSI's contract with Quantum was initially profitable, Burnside placed an order to buy a second MAX ROV in February of 1997, and paid a deposit of $16,500 to secure its construction.[5] (Tr., pp. 107-08.) In May of 1997, however, Quantum fell behind in its payment to both Perforadora and SSI. (Tr., p. 185; Jt. Exh. J-11.) As a direct result of Quantum's failure to make payments, SSI returned the rented Triton ROV to its owner, which resulted in a reduction of $60,000 in monthly rental expenses, and canceled its order for the second MAX ROV. (Tr., pp. 107, 110, 179-80.) By the end of the contract, Quantum owed SSI $720,750.53 for services rendered entirely in 1997. (Jt. Exhs. J-11, J-12.) Further, SSI terminated most of its employees, thereby reducing its work crew aboard the vessel to two employees, Michael Carlisle and William Allen, who operated the remaining equipment belonging to SSI. (Tr., pp. 30, 39-40, 244.) SSI's equipment aboard the vessel at that time included the MAX ROV system, a control van with technical equipment, a work van with tools, a winch, and the rented generator and fuel tank. (Tr., pp. 109-10.)

After granting Quantum numerous extensions, Perforadora terminated the Quantum charter in the latter part of June, 1997, because Perforadora had entered into a new charter of the vessel with Pemex to begin June 24, 1997. (Tr., pp. 584-86; Def.'s Exh. D-43.) At that time, Quantum had once again fallen behind on payments to Perforadora and had issued insufficient checks as payment. (Tr., p. 268.) Although the vessel was originally contracted to be returned to Carmen, Perforadora changed the termination destination

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[5] It takes approximately six months to construct and to customize a new ROV because it is not a piece of equipment readily available on the market. (Nicholson Depo., pp. 74-75.)

to the port of Dos Bocas, Mexico, in order to save transit time and to allow Pemex to inspect the vessel. (Tr., pp. 334, 586.) Pursuant to its original charter, Quantum, not SSI, was responsible for removing all of the equipment aboard Perforadora's vessel and to return the vessel to its pre-charter condition. (Tr., p. 588; Def.'s Exh. D-25, p. 7-104.8, Part II, 2(d).) In fact, Quantum notified Mexican customs of the equipment to be unloaded and received the necessary unloading permit. (Jt. Exh. J-5.)

II. The Seizure

When the vessel arrived in Dos Bocas during the early morning hours of June 23, 1997, Quantum personnel took their equipment off the vessel and left the dock. (Tr., p. 39.) Around 9 to 10 a.m., the captain of the vessel[6] awoke Carlisle and Allen and informed them that SSI's equipment aboard the vessel had been seized by Perforadora until Quantum paid the arrearage owed to Perforadora. (Tr., p. 40; Pl.'s Exh. P-96, pp. 73, 139; Def.'s Exh. D-54, pp. 70-72.) Thus, Carlisle and Allen moved the MAX ROV into the work van to protect it during the seizure. (Tr., pp. 40, 51.)

Contemporaneously, an agent of Perforadora, Angulo Geronimo, boarded the vessel on that morning and determined that Carlisle and Allen's work visas had expired. (Geronimo Depo., pp. 19-21.) Geronimo notified the Mexican immigration authorities who, in turn, ordered Carlisle and Allen to the local immigration office. (Tr., p. 40; Geronimo

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[6] The captain of the vessel was an employee of Perforadora. (Tr., p. 41.) During the course of this action, neither party has been able to locate him. (*Id.*) The Court, however, overruled Perforadora's objection to his statement. (Tr., p. 42.)

Depo., pp. 19-20.) After Carlisle and Allen went to the immigration office to correct the visa situation, they were released and told to return later that afternoon to pay a fine. (Tr., pp. 40-41; Geronimo Depo., pp. 21-22, 27.) Carlisle and Allen then returned to the vessel and discovered that SSI's equipment was being offloaded. (Tr., pp. 41, 43.) In response, Carlisle and Allen contacted Burnside and informed him that the equipment had been seized by Perforadora. (Tr., pp. 43, 114-15.) Upon returning to the vessel a second time, the vessel's captain, acting upon instructions from Correa, allowed Carlisle and Allen to retrieve their personal effects. (Tr., pp. 43, 310.) In fact, the captain had to unlock SSI's equipment for Carlisle and Allen to retrieve those items because the locks had been switched by Perforadora while the equipment was aboard the vessel. (Tr., pp. 40, 44-45.) After the seizure, Perforadora temporarily stored SSI's equipment in Pemex's fenced yard and hired an armed guard. (Tr., pp. 52, 314-15, 322.)

III. The Subsequent Events Including Legal Action

Upon learning of the seizure, Burnside contacted Quantum's representative to request assistance in the release of SSI's equipment. (Tr., p. 118, 252.) In fact, had Burnside been given the opportunity, he would have arranged for the use of a crane to unload the equipment. (Tr., pp. 251-52.) Burnside immediately left Louisiana in his truck and headed to Dos Bocas in an attempt to retrieve SSI's equipment. (Tr., p. 119.)

On or about June 26, 1997, Burnside arrived in Dos Bocas and met with Correa. (Tr., p. 119.) Again, Burnside informed Correa that SSI owned the equipment and he requested its release. Correa told Burnside that the equipment

was being held until Quantum paid Perforadora for its past due services. (Tr., pp. 120, 167.) Upon the request and representations made by Correa, Burnside signed an Acta Informativa written entirely in Spanish on June 27, 1997, describing the equipment offloaded and stating that it was done without any damage. (Tr., pp. 121-22, 314; Jtd. [sic] Exh. J-7.) More importantly, Correa released some of the delicate equipment including VCRs, monitors and a video typewriter, to Burnside on June 28, 1997, and even allowed him to take pictures. (Tr., p. 123, Jt. Exh. J-10.) After Correa refused the release of the bulk of equipment, Burnside returned to the United States. (Tr., p. 124.)

Within a week, Burnside returned to Mexico and again requested that Perforadora release SSI's equipment. (Tr., pp. 126-27.) Correa allowed Burnside to take three additional VCRs and a hand controller of the MAX ROV. (Tr., pp. 121, 223-24, 253.) Consequently, Burnside resorted to diplomatic channels by contacting his United States Congressman, Billy Tauzin, and the American Consulate in Merida, Mexico. (Tr., pp. 128; Jt. Exh. J-9.) Correa admitted that the consulate's office contacted him on July 14, 1997, and requested the release of SSI's equipment. (Tr., pp. 328-29; Pl.'s Exh. P-13.) Those efforts, however, were to no avail.

The most telling event was a meeting held on July 4, 1997, between Perforadora and Quantum representatives to discuss Quantum's outstanding debt. At the meeting, Correa was again informed, this time by Quantum, that SSI owned the equipment seized by Perforadora. (Tr., pp. 324-27; Pl.'s Exh. P-21, ¶¶ 7, 8(c).) In fact, Correa notified Perforadora's president of the meeting by a letter dated July 7, 1997, explaining that SSI owned the equipment and that the equipment would be released upon payment by Quantum of its

debt to Perforadora. (Pl.'s Exh. P-21, ¶¶ 7, 8(c).) Contrary to this knowledge, Perforadora loaded SSI's equipment aboard another vessel the day after the meeting and transported it to Perforadora's secured yard in Carmen. (Tr., p. 322.)

Prior to this meeting, Perforadora initiated a criminal investigation of Quantum on June 30, 1997. (Jt. Exh. J-14.) Despite Perforadora's knowledge that SSI owned the equipment, Lino Garcia, Perforadora's attorney, filed a petition with the Mexican Ministerio Publico[7] on August 8, 1997, requesting that the equipment be made part of the criminal investigation against Quantum. (Tr., pp. 390, 409-10, 424-25; Jt. Exh. J-15.) Specifically, Perforadora misrepresented to the Ministerio Publico that the equipment belonged to Quantum and failed to mention SSI's claim of ownership. (*Id.*) As a result, Perforadora was appointed custodian of SSI's equipment.

In response, SSI hired two Mexican attorneys, Jaimie Herrera and Braulio Manzaneque, to obtain the release of its equipment. Correa's daily planner proves that Herrera contacted him on September 2, 1997, and identified himself as SSI's attorney. (Pl.'s Exh. P-13.) Meanwhile, Manzaneque wrote to Perforadora on October 13, 1997, and personally met with Correa to request the release of SSI's equipment. (Tr., p. 359; Pl.'s Exh. P-18.) These efforts were also to no avail.

On October 20, 1997, SSI formally appeared before the Ministerio Publico and submitted numerous documents and testimony conclusively establishing ownership of the equipment. (Jt. Exh. J-16; Garza pp. 387, 422.)

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[7] The Ministerio Publico is a Mexican official somewhat similar to a district attorney. (Tr., p. 19)

Perforadora's attorney, however, filed the customs documents with the Ministerio Publico claiming that Quantum was the owner of the equipment as an "importer." (Tr., pp. 389-90; Def.'s Exh. D-1; Jt. Exh. J-17-J-18.) With full knowledge that the equipment belonged to SSI,[8] Garcia requested that the equipment not be released until the end of criminal investigation against Quantum. (*Id.*) To make matters worse, Garcia represented to the Ministerio Publico that the equipment would be stored in Perforadora's warehouse until conclusion of the case. (Jt. Exhs. J-15, J-17.) Contrary to this representation, Perforadora stored SSI's equipment in its yard in Carmen, exposed to the elements. (Tr., p. 365.)

After the unsuccessful attempts to reclaim its property, SSI discovered that Perforadora was constructing a drilling rig at TDI Halter in Pascagoula, Mississippi. (Ct. R., Doc. 1.)As a result, SSI filed the instant action on May 27, 1998, seeking attachment of the rig under Supplemental Admiralty Rule B and for damages under the general maritime law. (*Id.*) After entertaining numerous pretrial motions, this Court determined that admiralty jurisdiction exists but denied the Rule B attachment. (Ct. R., Docs. 48, 62-63, 108-09.)

Although the criminal investigation against Quantum concluded on September 30, 1998, SSI's attorneys requested that Perforadora assist in the release of the equipment to allow SSI to mitigate its damages. (Garcia Depo., pp. 45-46; Pl.'s Exhs. P-90, P-91.) Apparently, those requests were ignored.

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[8] Perforadora's attorney knew the property did not belong to SSI at this point because *inter alia* the articles specified in the custom forms made it impossible to conclude that Quantum was the owner of the equipment. Thus, Perforadora submitted these documents to the Ministerio Publico solely to cause confusion and to prevent the release of SSI's equipment.

On November 19, 1998, Chief United States Magistrate Judge John M. Roper ordered the parties to cooperate to obtain the release of SSI's equipment. (Ct. R., Doc. 59.) As a result, Perforadora submitted Garcia's affidavit to the Ministerio Publico stating that Perforadora had no opposition to the release of SSI's equipment. (Jt. Exh. J-20.) SSI then obtained new Mexican attorneys, Patricio Rangel Dimas and Jorge Montezuma Torre, who requested the release of the equipment from the Ministerio Publico. (Jt. Exh. J-19.) Without any additional documentation, proof or testimony, other than the testimony previously submitted in October of 1997 and Perforadora's 1999 affidavit of "no opposition," the Ministerio Publico held that, "[SSI] clearly established that [the equipment] is not property of Quantum, Ingenieros S.A. de C.V., nor Perforadora Central, S.A. de C.V...." (Jt. Exh. J-21.) On or about March 1, 1999, the equipment was finally released and returned to the United States on March 15, 1999. (Pl.'s Exhs. P-69, P-71.)

IV. Condition and Value of the Equipment

Upon its return to SSI, the equipment was inspected by experts who concluded that the equipment, including the MAX ROV, was a total loss resulting from excessive heat and corrosion due to its exposure to salt and water.[9] Prior to that time, neither Burnside nor SSI knew that its property was damaged beyond repair. Moreover, it is undisputed that the equipment was in good working order and condition prior to the seizure. (Tr., p. 34, 122; Nicholson Depo., pp. 129-30, 137.) The testimony and evidence also indicates that the

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[9] (Tr., pp. 143-156, 175-76; Chesshir Depo., pp. 25, 27-28, 31, 52-55; Def.'s Exh. D-24; Nicholson's Depo., pp. 76-81, 91-92, 95, 140-41; Pl.'s Exhs. P-11, P-12, P-23.)

equipment, including the MAX ROV, were not damages as a result of any fault of SSI. (Tr., p. 38; Nicholson Depo., pp. 81-82, 133-34.)

The evidence establishes that the original and replacement values of the equipment deemed a total loss include:

Equipment	Original Value	Replacement Value
MAX ROV	$168,400.00[10]	$245,850.00[11]
Underwater Video Camera	$7,200.00[12]	$46,865.00[13]
Winch	$5,226000[14]	[15]

[10] The MAX ROV was purchased on May 15, 1996. (Tr., p. 75; Pl.'s Exh. P-27.)

[11] This replacement value is the cost of the MAX ROV as of April 16, 1999. (Tr., p. 142; Pl.'s Exh. P-30.) The replacement value of the MAX ROV that was ordered in December of 1996, and was canceled in May of 1997, cost approximately $165,000. (Def.'s Exh. D-42.) Although a total loss, the parties agree that the MAX ROV had a $25,000 salvage value. (Pl.'s Exh. P-23; Def.'s Exh. D-24.)

[12] (Tr., pp. 143-44; Pl.'s Exh. P-32.)

[13] This replacement value is the cost of the underwater video camera as of May 13, 1999. (Tr., pp. 143-44; Pl.'s Exh. P-34.)

[14] (Tr., pp. 144-46; Pl.'s Exhs. P-35, P-36, P-37.)

[15] No evidence was produced on replacement value.

Slip Ring Assembly	$2,771.00[16]	_____[17]
1850 feet of Tether	$11,100.00[18]	$11,805.00[19]
VCR	$999.00[20]	_____[21]
Work Van	$1,200.00[22]	$36,450.00[23]
Control Van	$_____[24]	$37,920.00[25]

[16] (Tr., pp. 148-49; Pl.'s Exhs. P-38, P-39.)

[17] No evidence was produced on replacement value.

[18] (Tr., pp. 148-50; Pl.'s Exh. P-40, p. 2.) At $6.00 per foot, the cost of 1,850 feet is $11,100.00.

[19] (Tr., p. 150-51; Pl.'s Exh. P-42.) 1 meter is 3.28 feet. Thus, 1,850 feet of tether divided by 3.28 feet equals 564.02 meters. The cost is £ 13 per meter. Accordingly, the replacement cost of 564.02 meters of tether is £7332.32. At $1.61 per pound, the cost in U.S. dollars if $11,805.00.

[20] (Tr., pp. 151, 222-24; Pl.'s Exhs. P-43, P-44.)

[21] No evidence was presented on replacement value.

[22] (Tr., pp. 152-53; Pl.'s Exh. P-46.)

[23] (Tr., p. 154; Pl.'s exh. P-47.)

[24] The SEA OWL and Control Van were purchased together in 1993 for a total of $47,500.00 (*See* Jt. Exh. J-22, 1997 Tax Return, Asset Depreciate List.)

[25] (Tr., pp. 154; Pl.'s Exh. P-47.)

Various Tools	$1,819.13[26]	$_____[27]

V. Loss of the SEA OWL and Total Destruction of SSI

Despite Quantum's inability to pay the remaining $720,000 and Perforadora's seizure of its primary ROV, the MAX ROV, SSI continued to survive as a corporation. Burnside contracted out his remaining employees, Carlisle and Allen, to other corporations such as Canyon Offshore, who operated ROVs. (Tr., pp. 42-43.) Prior to the seizure, SSI advertised the MAX ROV. (Pl.'s Exh. P-75.) An article[28] was even published in an industry journal identifying SSI and the capabilities of its MAX ROV. After the seizure, SSI had to turn down jobs because it no longer possessed the MAX ROV. In December of 1997, Carlisle and Allen were terminated because of SSI's inability to retain their services. (Tr., p. 43.)

In February of 1998, however, Burnside received a call from a company by the name of Consolidated Natural Gas [CNG] for the use of his services and the SEA OWL to inspect the structure of an oil rig that had exploded. (Tr., pp. 224-25.) Although a highly dangerous situation, Burnside agreed on behalf of SSI to perform the work. (Tr., p. 225.) During the 37 hour dive without the use of SSI's MAX ROV,

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[26] (Tr., pp. 154-55; Pl.'s Exhs. P-48-P-62.)

[27] No evidence of replacement value was produced on these items.

[28] Chris Stimpson, "Max Rover ROV: New Opportunities for Scientific, Commercial Groups," SEA TECHNOLOGY, December 1997, at 10-13. (Pl.'s Exh. P-74.)

the SEA OWL's tether[29] became entangled in the footing of the rig. (Tr., pp. 233-34.) Burnside attempted to retrieve the SEA OWL by cutting the tether and pulling the ROV aboard the vessel. (Tr., pp. 234-35.) At the point when the SEA OWL made it to the surface, but not aboard the vessel, the tether got caught in and was severed by the blades under the vessel and the SEA OWL fell approximately 260 feet to the bottom of the Gulf of Mexico. (Tr., pp. 236-37.)

Burnside attempted to contact other companies to use their ROVs to pinpoint and capture the SEA OWL. (Tr., pp. 237-38.) Other ROVs, however, were unable to reach the SEA OWL. (*Id.*) If SSI's MAX ROV had been available, SSI had more than a 50% chance of finding the recovering the SEA OWL. (Tr., p. 226; Chamblee Depo., p. 41.)[30] The MAX ROV had the diving ability of 3,300 feet and could find an object as little as a three-foot rod on the ocean's floor. (Tr., pp. 76, 138-39.) For the reasons above, the SEA OWL was lost as a direct result of Perforadora's seizure of the MAX ROV, thereby causing SSI to cease its operations.

Burnside further testified that if the SEA OWL could be presently recovered, it would also be a total loss. The evidence establishes that the SEA OWL was insured for $100,000 at the time it was lost. (Pl.'s Ex. P-31.) The insurance, however, excluded the loss because SSI used the

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[29] The tether is a cord linking the ROV to the control van aboard a vessel.

[30] The testimony of Perforadora's expert, David Chesshir, is unreliable in this respect because he was unaware of the depth, the conditions presented on that day, or the MAX ROV's capabilities. (Chesshir Depo., pp. 51-52.) Further, Chesshir had not operated an ROV in over 10 years. (*Id.*, at pp. 22-23.)

ROV during an oil rig blowout. (Tr., p. 231.) Burnside admitted, over objection from his counsel, that CNG paid SSI $135,000 on August 25, 1998, for the loss of the SEA OWL during the emergency situation. (Tr., pp. 227-29, 241, 248-50.)

Conclusions of Law

I. Liability

The Court previously determined that admiralty jurisdiction exists. (Ct. R., Doc. 62.) Subsequently, the Court held that it has personal jurisdiction over Perforadora and that Perforadora waived any personal jurisdiction through its admissions and by filing its counterclaim. (Ct. R., Doc. 108, pp. 6-8.) The Court further finds that venue is appropriate under 28 U.S.C. § 1391 (d). For the reasons set forth in its Memorandum Opinions, the Court exercised its discretion in declining to transfer this action to Mexico. (Ct. R., Docs. 62, 108, 129, pp. 2-3.) Based upon those prior opinions and the subsequent testimony and evidence submitted at trial, the Court renews its finding that Mexico does not provide an adequate forum in this case.

Courts have consistently recognized the tort of conversion within its admiralty jurisdiction. *The Lydia*, 1 F.2d 18, 23 (2nd Cir. 1924). To prove conversion under maritime law, the plaintiff must show an "unlawful and wrongful exercise of dominion, ownership or control over the property of another, to the exclusion of the same rights by the owner." *Goodpasture, Inc. v. M/V Pollux*, 602 F.2d 84, 87 (5th Cir. 1979). Moreover, "[t]he tort must have occurred on or over navigable waters." *Gaspard v. Amerada Hess Corp.*; 13 F.3d 165, 167 (5th Cir. 1994); *See* also *The Lydia*, 1 F.2d

at 23. Based upon the testimony and evidence, the Court renews its finding that maritime law applies and specifically finds that Perforadora illegally seized SSI's property aboard its vessel in the territorial waters of Mexico. The Court further finds that Perforadora converted SSI's equipment from June 23, 1997, to March 1, 1999, in an effort to exert pressure on Quantum for the arrearage owed from Quantum to Perforadora.

Perforadora, however, submitted three defenses for its actions as follows: (1) lack of knowledge of SSI's ownership; (2) abandonment; and (3) that liability terminated once the property was turned over to the Ministerio Publico. The Court will address these arguments in seriatim.

A. Lack of Knowledge

Initially, Correa asserted that Perforadora had no knowledge that SSI owned the equipment that was seized on June 23, 1997. The testimony and evidence, however, indicates that Perforadora knew the equipment belonged to SSI as early as November 3, 1996. As previously stated, Perforadora picked up SSI's equipment on that date; SSI's employees wore red coveralls with SSI's logo on back; the SSI containers were painted red and were clearly marked with SSI's name; and SSI's employees were the only foreigners on the vessel. Moreover, only Perforadora and SSI employees were aboard the vessel during the initial trip to Carmen and Burnside informed Perforadora's captain that SSI owned the equipment.

Notwithstanding those facts, Correa boarded the vessel in Carmen and inspected SSI's ROVs. In addition to being notified of SSI's ownership, Correa acknowledged that he

could distinguish SSI's employees and equipment. Further, Perforadora cannot rely on the customs documents originally filed on November 7, 1997, to argue lack of notice. As previously stated, the articles specifically cited on those forms could only be used to import a foreign corporations' equipment.

Additionally, SSI's employees operated it ROVs for nearly seven months in plain view of Perforadora's personnel. Under Mexican law, a person with possession of the equipment is presumed to be the owner. (Tr., p. 381, 398-400, 461.) From the testimony before the Court, it is simply implausible to find that either Correa or Perforadora's crew members failed to notice SSI's employees operating SSI's equipment.[31] Even Jorge Villalpando, assistant to the president of Perforadora, testified that he was aware that the equipment aboard the vessel belonged to several different companies, including SSI and Welch. (Tr., pp. 289-90).

On the day of the seizure, Carlisle and Allen were allowed to retrieve some of their personal belongings. Correa even permitted Burnside to take some of his delicate equipment on two different occasions shortly after the seizure. This fact alone, indicates that Correa knew that SSI owned the equipment or else he would not have agreed to release even minor pieces of the equipment to Burnside. Likewise, if there

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[31] Correa boarded the vessel at least ten times during Perforadora's contract with Quantum; a few of Perforadora's employees on the vessel admit that they knew the equipment did not belong to Quantum; and the vessel's captain would request either Carlisle or Allen to move SSI's equipment when the vessel needed to be refueled. (Tr., p. 33; Fuentes Depo., pp. 8, 18; Rodriguez Depo., pp. 8-9; Medina Depo., p. 19.)

was any question as to ownership of the equipment, Correa would not have requested Burnside to sign the Acta Informativa or take pictures of the equipment.

More importantly, Correa attended a meeting on July 4, 1997, in which Quantum informed him that the equipment belonged to SSI. Correa notified his superiors by letter dated July 7, documenting this information. Correa even testified that Perforadora knew of SSI's ownership as of July 4, 1997. (Tr., p. 325; Pl.'s Exh. P-21.) Notwithstanding that knowledge, Perforadora's attorney filed a petition with the Ministerio Publico on August 8, 1997, claiming that the equipment was subject to the criminal investigation of Quantum, without mentioning that SSI claimed ownership of the equipment. The testimony is simply overwhelming that prior to the seizure, during the seizure, and after the seizure, Perforadora knew that SSI owned the MAX ROV and its related equipment. Any argument to the contrary is simply without merit.

B. Abandonment

Despite Perforadora's knowledge that the equipment belonged to SSI, it claims that the property was abandoned on June 23, 1997. The evidence before the Court, however, does not indicate that SSI abandoned or intended to abandon their equipment. Carlisle and Allen secured the MAX ROV in its container before being ordered to the local immigration office regarding their visas. They returned to the vessel twice that afternoon and were even allowed temporary access. One of Perforadora's employees, Victor Fuentes, also stated that Carlisle and Allen were making arrangements to take their equipment on that date. (Fuentes Depo., pp. 12, 18, 23-25.) Although they were not present when Perforadora began

offloading the vessel and did not assist Perforadora in performance of that act,[32] there is no proof that they were under a duty to do so. Instead, Quantum was responsible for returning the vessel to its pre-charter condition.[33] Whether Carlisle and Allen had the means to unload SSI's heavy equipment at Dos Bocas instead of the port in Carmen is also irrelevant.[34] There is simply no evidence that either SSI or Carlisle and Allen abandoned the equipment.

C. Ministerio Publico

Correa's testimony regarding the Ministerio Publico is riddled with inconsistencies. At trial, Correa stated that he conferred with Villalpando on June 23, 1997, who informed him to seek the advice of local counsel, Garcia, regarding the equipment. Correa further testified that after consulting with Garcia, that he instructed Garcia to turn the equipment over to the Ministerio Publico on June 23, 1997, because Perforadora did not know whether SSI or Quantum owned the equipment. (Tr., pp. 337, 339, 342, 344, 603.) In contrast, Correa also testified that he first discovered SSI's claim to ownership of the equipment on or about July 4, 1997. (Tr., p. 325.)

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[32] Mendoza Izucar Depo., pp. 10, 15-16. Mendoza Izucar was one of Perforadora's marine mangers who supervised the clearance of the vessel and who ultimately reported to Correa.

[33] Perforadora could have unloaded the equipment and charged Quantum for those services because their contract was with Quantum, not SSI.

[34] It is uncontradicted that Burnside could have arranged for the equipment to be unloaded in Dos Bocas had he known that Perforadora intended to seize the equipment

To add further confusion to the situation, Correa submitted an affidavit during the course of this litigation, whereby he stated that the equipment was turned over to the Ministerio Publico once it was discovered that there was a dispute concerning ownership. (Pl.'s Exh. P-95, ¶ 22.) In that affidavit, he maintained that he first learned of SSI's claim on July 7, 1997, and immediately instructed Garcia to submit the equipment to the Ministerio Publico at that time. (*Id.*) As noted above, this is contrary to his trial testimony, whereby he stated that the decision was made on June 23, 1997. (Tr., p. 342.)

Nevertheless, Perforadora was required under Mexican law to submit the equipment to the Ministerio Publico within three days if it believed the equipment to be abandoned or if there was a dispute concerning ownership. (Tr., pp. 382-83.) As previously stated, neither Perforadora nor Garcia submitted a petition regarding the equipment to the Ministerio Publico until August 8, 1997. The petition claimed that Quantum owned the equipment and failed to mention any ownership dispute. Regardless of its reason, both Mexican experts testified that Perforadora had no legal right to maintain possession of the equipment from June 23, 1997, through August 8, 1997. (Tr., pp. 384-85, 457.)

Correa's testimony regarding ownership of the equipment is further refuted because he did not obtain the Pedimento Importacion or customs documents until July 6, 1997, and did not give the documents to Garcia until October of 1997. (Tr., p. 353, 355; Garcia Depo., p. 53; Pl.'s Exhs. P-4, P-95, ¶ 22.) The point is, Correa did not have the document on June 23, 1997, when he allegedly instructed Garcia to submit the equipment to the Ministerio Publico to determine ownership. Garcia even testified that he did not

know of any dispute in ownership until mid-August, after he had already submitted the equipment. (Garcia Depo., pp. 33-34.)

For the reasons above, the Court finds that Correa's testimony is inconsistent and unbelievable. The Court further finds that despite Perforadora's knowledge of SSI's ownership of the equipment, that they misled their attorney and submitted SSI's equipment to the Ministerio Publico under misrepresented facts. As a result, the Court finds that Perforadora acted illegally for doing so. Perforadora's Mexican expert, Carlos Loperna, even stated that Perforadora would have acted illegally if it had submitted the equipment under misrepresented facts. (Tr., pp. 461-63.)

More importantly, Perforadora has consistently maintained that it "has never claimed ownership of the equipment and has always been willing to turn it over to the true owner." (Pl.'s Exh. P-95, ¶ 24.) Despite this assertion, Correa and Villalpando both testified that at the time the vessel came into Dos Bocas, they were not concerned with ownership of the equipment, only payment from Quantum. (Tr., pp. 269, 351, 354.) This is contrary to Perforadora's actions on October 23, 1997, when its attorney appeared before the Ministerio Publico to contest the release of SSI's equipment. Although Perforadora knew that SSI owned the equipment, Garcia submitted an affidavit claiming for the first time that there was a dispute regarding ownership. (Jt Exh. J-18.)

At any time, Perforadora could have relinquished its depository status and informed the Ministerio Publico that it had no objection to the release of SSI's equipment. (Tr., pp. 385, 475-76.) Perforadora, however, failed to do so until

ordered by the Court even though it admitted having knowledge that SSI owned the equipment as early as July 4, 1997. Instead, Perforadora took an adversary position on October 23, 1997, and filed an opposition to the release of the equipment.

For these additional reasons, the Court finds that Perforadora perpetuated its bad faith behavior when it appeared and protested on October 2, 1997, solely to prevent the lawful release of the equipment to SSI. (Tr., pp. 422-23.) Under the circumstances described above, the belated delivery to the Ministerio Publico did not absolve Perforadora of liability. (Tr., pp. 406, 409, 432, 466-473.) As a result, the Court finds that the actions taken by Perforadora were illegal from the moment the equipment was seized aboard the vessel on June 23, 1997, until March 1, 1999, the date it was released by the Ministerio Publico.

II. Damages

A. Actual Damages

In admiralty, the general rules for determining damages in negligence actions involving vessels are as follows:

> It is fundamental that when a vessel is lost or damaged, 'the owner is entitled to its money equivalent, and thereby to be put in as good a position pecuniarily as if his property had not been destroyed.' *Standard Oil Company v. Southern Pacific Company*, 268 U.S. 146, 155, 45 S.Ct. 465, 466, 69 L.Ed. 890 (1924). To

> further this policy courts have long held that where a vessel is a total loss the measure of damages is the market value at the time of loss. *Id.* at 155, 45 S.Ct. at 466. Where there are insufficient sales to establish a market other evidence such as replacement cost, depreciated, expert opinion and the amount of insurance can also be considered to determine the value of the vessel.

E.I. DuPont de Nemours & Co., Inc., v. Robin Hood Shifting & Fleeting Serv., Inc., 899 F.2d 377, 379-80 (5th Cir. 1990) (*citing King Fisher Marine Serv., Inc., v. NP Sunbonnet*, 724 F.2d 1181, 1185 (5th Cir. 1984). It must be noted that the instant action involved an intentional tort and did not involve a collision between vessels. Further, unlike the situation where vessels collide and damages can be immediately assessed upon examination, SSI's equipment did not become a total loss on the day that it was seized by Perforadora. Rather, the total loss occurred at some point between June 23, 1997, and March 1, 1999, from being exposed to the elements while in Perforadora's possession. The total loss was not even discovered until after SSI's equipment was returned to the United States on March 15, 1999. Moreover, there was no readily available market for a used and customized ROV such as the MAX ROV, or its related equipment.

The Court notes that case law on maritime conversion is sparse. The United States Supreme Court, however, has recognized that admiralty courts are courts of equity. *Vaughan v. Atkinson*, 369 U.S. 527, 530 (1962). Unfortunately, the only Fifth Circuit case dealing with an

intentional tort in admiralty was *Goodpasture*,[35] whereby the court found that conversion had occurred without discussing any issues of damages. Under the circumstances this case, the Court finds that SSI is entitled to replacement costs of the equipment at the time the trial loss was discovered, where proven. Otherwise, SSI is entitled to the original cost of the equipment.

As a result, SSI is entitled to the replacement value of the following equipment: (1) the MAX ROV in the amount of $245,850; (2) the underwater video camera in the amount of $6,865; (3) 1850 feet of tether in the amount of $11,805; (4) the work van in the amount of $36,450; and (5) the control van in the amount of $37,920. SSI is also entitled to the original cost of the following equipment: (1) a winch in the amount of $5,226; (2) a slip ring assembly in the amount of $2,771; (3) a VCR in the amount of $999; and (4) various tools in the amount of $1,819.13. Thus, the total initial assessment of actual damage is $349,705.13.

Because the MAX ROV was purchased in May of 1996 and the control van in 1993, the Court must determine depreciation value for the total loss of the equipment when replacement cost is assessed. *Pillsbury Co. v. Midland Enterprises, Inc.*, 715 F. Supp. 738, 764-65 (E.D. La. 1989). The testimony and evidence indicates that the average ROV has a work life expectancy of 10 years and a depreciation value of 10% per year. (Nicholson Dep., pp. 30, 146-48; Chamblee Depo., p. 33.) Because some of the equipment was purchased within a year of the seizure and the other equipment purchased earlier, the Court finds that the actual damages due SSI should be reduced by 10% to offset depreciation of the

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[35] *Supra*, 602 F.2d 84.

equipment for one year prior to the seizure. Applying that rational, the amount of actual damages due SSI from Perforadora after the offset of depreciation is $314,734.62. After applying the $25,000 salvage value of the MAX ROV, the Court finds that the total amount of actual damages due SSI from Perforadora is $289,734.62.

B. Prejudgment Interest

In admiralty cases, prejudgment interest is awarded unless "peculiar circumstances" make it inequitable. *Cantieri Navali Riuniti v. M/V Skyptron*, 802 F.2d 160, 165 (5th Cir. 1986) (citation omitted). Prejudgment interest is not awarded "as a penalty, but as compensation for the use of funds to which the claimant was rightfully entitled." *Noritake Co., Inc. v. M/V Hellenic Champion*, 627 F.2d 724, 728 (5th Cir. 1980). Because peculiar circumstances do not exist in the instant action, the Court finds that SSI is entitled to prejudgment interest at the rate of 8% per annum resulting from the conversion of SSI's equipment. The Court therefore finds that SSI is entitled to prejudgment interest from Perforadora in the amount of $48,211.84.[36]

C. Consequential Damages

Generally, admiralty does not allow loss of use[37] or

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[36] Prejudgment interest at a rate of 8% per annum from June 23, 1997, to June 23, 1998, is $23,178.77. After compounding that interest to the principal amount of $289,734.62, the prejudgment interest from June 23, 1998, to the date of judgment results is an additional $25,033.07.

[37] Loss of use will be discussed below under similar principles.

consequential damages in negligence actions involving collisions between vessels or barges.[38] As previously stated, however, the instant action involved an intentional tort unrelated to a negligent collision between a vessel or a barge. Even in negligence cases, parties can recover other damages that could be reasonably anticipated, such s those incurred by the negligent repair of the initial damage. *Marathon Pipe Line Co. v. Drilling Rig Rowan/Odessa*, 761 F.2d 229, 233-34 (5th Cir. 1985). Under the unique circumstances of this case, the Court finds that equity entitles SSI to consequential damages resulting from Perforadora's intentional tort.

1. The SEA OWL

As previously stated, SSI lost the SEA OWL as a direct result of Perforadora's seizure of SSI's MAX ROV. Thus, the SEA OWL is considered a total loss in February of 1998. The Court finds that there was no readily available market for a used ROV such as the SEA OWL. As a result, replacement value, depreciation, expert opinion or the amount of insurance can be used when market value is inconclusive. Because SSI failed to show the replacement value of the SEA OWL, the amount of insurance is used to assess the value of that particular ROV. The insurance value of the SEA OWL was $100,000. While Perforadora argued that a payment from CNG to SSI is not a collateral source, the Court disagrees. The Fifth Circuit has stated that, "[t]he collateral source rule is a substantive rule of law that bars a tortfeasor from reducing the quantum of damages owed to a plaintiff by the amount of recovery the plaintiff receives from other sources

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[38] *Pillsbury Co., supra*, 715 F. Supp. at 763 n. 72 (*citing Albany Ins. Co. v. Bengal Marine, Inc.*, 857 F.2d 250, 253 (5th Cir. 1988)); (*see also King Fisher, supra*, 724 F.2d at 1186-87.)

of compensation that are independent of (or collateral to) the tortfeasor." *Davis v. Odeco, Inc.*, 18 F.3d 1237, 1243 (5th Cir. 1994). The payment from CNG to SSI was independent of any contribution by Perforadora, and is therefore excluded from consideration by the collateral source doctrine. As a result, SSI is entitled to consequential damage to the SEA OWL in the amount of $100,000.

2. The Second MAX ROV

From the testimony and evidence presented, the second MAX ROV that SSI ordered in February of 1997, and canceled in May of 1997, directly resulted from Quantum's lack of payment. There is no conclusive evidence to establish that SSI would have been able to purchase that ROV prior to the end of 1997, even if its original MAX ROV had not been seized. The Court therefore finds that Perforadora cannot be held liable for SSI's inability to acquire a second MAX ROV, or the deposit paid on behalf of that ROV.

3. Cost of Release of the Equipment

SSI also seeks to recover other expenses which it incurred as a result of Perforadora's actions. Those expenses include the following: (1) $10,000 paid to its initial Mexican attorneys, Herrera and Manzaneque, who attempted to obtain release of SSI's equipment on October 20, 1997; (2)$3,500 which SSI sent to Oscar Olivera in Mexico in order to pay an official to release the MAX ROV system; (3) $12,300 for customs fines and fees; (4) $3,000 for the law firm to obtain the release of SSI's equipment through customs; (5) $5,068 for shipping and customs charges to return the equipment to the United States; and (6) $11,175 charged by SSI's subsequent Mexican attorneys, Dimas and Torre, who finally

obtained the release of SSI's equipment from the Ministerio Publico on March 1, 1999. (Tr., pp. 160-168; Pl.'s Exhs. P-63-69, P-72, P-73.)

The custom charges were initially incurred upon the expiration of SSI's temporary import permit. The custom charges began on May 11, 1997, and continued until March 26, 1999. (Tr., pp. 391-92; Pl.'s Exh P-67.) The charges were calculated every 15 days at $135 per period[39] and there were a total of 45 periods. (*Id.*) Because 3 of the 15-day periods elapsed between May 11 and June 23, 1997, and would have occurred regardless of the illegal detention, the remaining 42 periods resulted from Perforadora's seizure of the equipment for a total expense of $5,670. A 15% tax added to that expense under Mexican law brings the total customs charge attributable to Perforadora's detention to $6,520.50. (Tr., pp. 394-95.) SSI has failed to prove that any of the other custom charges were attributable solely to the detention.

Because Quantum failed to pay for SSI's shipping charges to the United States as they were required to do, SSI would have incurred those charges regardless of the illegal detention. Thus, SSI cannot recover for the shipping charges. Likewise, SSI cannot recover the $3,000 in attorneys' fees incurred to release the equipment from customs. The $3,500 expended by SSI in an effort to pay a Mexican official to release the equipment was simply a bad idea, for which Perforadora should not be held accountable. Although SSI hired Mexican counsel in order to obtain the release of its equipment, those fees will be discussed, *infra*, in conjunction

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[39] 1350 pesos per period at the exchange rate of 10 pesos per dollar.

with SSI's general request for attorneys' fees.

D. Loss of Profits/Loss of Use

As noted above, damages for loss of use are generally not recognized in admiralty cases involving negligence actions between vessels or barges. The rationale behind that rule is that a vessel owner has a duty to mitigate his damages by immediately replacing the vessel when it is a total loss due to collision. *Barger v. Hanson*, 426 F.2d 640, 642 (9th Cir. 1970). In the instant action, the equipment was not a total loss upon seizure. Moreover, neither party can conclusively demonstrate when the total loss actually occurred, except to show that it occurred while in Perforadora's possession exposed to the elements. It only follows that SSI did not know that the equipment was a total loss until it was returned from Mexico on March 15, 1999. The Fifth Circuit has even affirmed a district court's finding limiting the loss of use period to the time when the owner of a barge knew or should have known that its barge was a total loss. *E.I. DuPont, supra*, 899 F.2d at 382.

Although a party is generally made whole in a total loss case by market value plus interest, equity mandates that SSI be awarded lost profits. SSI's business simply folded as a direct result of the unlawful seizure if its equipment. Further, it will take approximately three years to return to its pre-seizure status.

SSI, however, must prove lost profits with reasonable certainty. *Delta S.S. Lines, Inc. v. Avondale Shipyards, Inc.*, 747 F.2d 995, 1001 (5th Cir. 1984) (citation omitted). This does not require a showing of specific contracts which were lost during the detention period. *In re M/V Nicole Trahan*, 10

F.3d 1190, 1194-95 (5th Cir. 1994). Proof of an active market, rather than loss of a specific opportunity, is sufficient to recover lost profits. *Marine Transp. Lines, Inc. v. M/V Tako Invader*, 37 F.3d 1138, 1140-41 (5th Cir. 1994)). A ready market can be established through testimony that the equipment was active before the incident. *Delta S.S. Lines, Inc.*, 747 F.2d at 1001.

After resuming its operations in July of 1995, SSI's income tax returns for that year illustrated gross receipts for sales of $161,664, and ordinary income of $1,920. (Jt. Exh. J-22.) SSI's income tax returns further show the following: (1) in 1996, gross receipts for sales of $443,955, and ordinary income of $65,595; (2) in 1997, gross receipts for sales of $907,686, and ordinary income of $14,845; and (3) in 1998, gross receipts of $244,031, and ordinary loss of $78,596. (Jt. Exh. J-22.)

Perforadora's expert accountant, John Theriot, testified that the Generally Acceptable Accounting Principles [GAAP] require that, "the earning process is not complete until collection of the sales price is assured reasonably." (Tr., p. 540.) Theriot, however, testified at this deposition that income is considered earned when "services [were] performed and billed." (Tr., p. 563.) Regardless, Theriot failed to match income and expenses by excluding the $720,750.53 invoiced to Quantum in 1997, without excluding the costs associated with those services. (Tr., pp. 484-85, 492-95, 558-60.) Although Quantum was SSI's only bad debt, Theriot's also assumed that SSI would have further significant bad debt expenses. (Tr., pp. 174-75, 547.) Further, Theriot used a three-year base period, without adjustment for the fact that SSI did not begin its operation until July of 1995. (Tr., pp. 556-57.) Finally, Theriot's analysis and projections were based on

the earnings of companies which were not similar to SSI. (Tr., pp. 171-74, 565-572.)

Cliff Chamblee, the vice-president of Canyon Offshore,[40] testified by deposition concerning the growth of Canyon from the time it was founded in March of 1997, with 15 employees and 2 leased ROVs, to its present status of at least 60 employees and 10 ROVs. (Chamblee Depo., pp. 18, 21.) Chamblee further testified that the market for ROVS was good between March of 1997, until the early part of 1999. (*Id.* at p. 26.) In his opinion, however, the future of the market would increase by the summer of 1999 until the end of the year. (*Id.* at p. 39.) Similarly, until Quantum failed to pay its outstanding debt and SSI's equipment was seized on June 23, 1997, the evidence indicates that SSI had substantial growth in revenues since resuming operations in July of 1995. Burnside also testified that SSI's inspection work related to government mandated inspections would continue regardless of construction activity in the oil and gas industry. (Tr., pp. 77-78.)

Because SSI did not fully operate in 1995, it would be inappropriate to use the entire three-year history in ascertaining SSI's loss of earning, as suggested by Theriot. As previously stated, Quantum owed SSI $720,750.53 for services rendered entirely in 1997. Theriot admitted that his analysis would be misleading if the outstanding debt was earned and invoiced in 1997, without matching the expenses associated with that debt. (Tr., pp. 559-60.) Theriot also failed to compare Canyon's coincidental rise in the ROV business at about the identical time that Perforadora seized

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[40] When SSI was actively using its MAX ROV and SEA OWL, Canyon Offshore was one of its main competitors.

SSI's equipment, yet he purportedly compared SSI to similar businesses. (Tr., pp. 568-71, 578-79.) Theriot's opinion is therefore inconsistent with the evidence presented at trial.

On the other hand, Panzeca used six-month periods and provided numerous scenarios, both including and excluding Quantum's outstanding debt of $720,000. In order to be certain that Quantum's debt does not effect SSI's earning capacity, the Court finds that Panzeca's projections in his second chart, including the extension of SSI's loss period until December 31, 2002, to accurately reflect SSI's loss of profits. (Tr., pp. 496-98; Pl.'s Exh. P-86, Chart 2.) In that analysis, Panzeca eliminated the expenses and revenues associated with Quantum's outstanding debt that was accumulated entirely in 1997. (*Id.*) Panzeca further indicated that if a second MAX ROV was not considered, that it could be subtracted from the total lost profits by simply identifying the amount listed under "base loss profits." (Tr., pp. 487-88; Pl.'s Exh. P-86, Chart 2.) Based on SSI's earning capacity, the exclusion of the purchase of a second MAX ROV, and the exclusion of Quantum's outstanding debt and expenses in 1997, the Court finds that SSI is entitled to total loss earnings of $2,311,140 from Perforadora resulting from the seizure.

E. Punitive Damages

Unlike typical admiralty cases involving a breach of contract or a personal injury, punitive damages remain an appropriate recovery in intentional property damage cases. *CEH, Inc. v. F/F Seafarer*, 70 F.3d 694, 702 (1st Cir. 1995). In order to be awarded punitive damages, SSI must show "intentional or wanton and reckless conduct [amounting] to a conscious disregard of the rights of others." (*Id.* at 699) (*citing The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 558

(1818)); (*see also Protectus Alpha Navigation Co., Ltd. v. North Pac. Grain Growers*, 767 F.2d 1379, 1385 (9th Cir. 1985).)

Under the circumstances of this case, punitive damages are appropriate. Perforadora[41] seized SSI's equipment with full knowledge that the equipment belonged to SSI. Perforadora converted SSI's equipment in an effort to exert pressure on Quantum to pay its arrearage to Perforadora. Further, Perforadora refused to return SSI's equipment to Burnside despite its knowledge that SSI owned the equipment. Instead, Perforadora misrepresented SSI's ownership to its attorney and Perforadora illegally submitted SSI's equipment under false pretenses to the Ministerio Publico over a month after the seizure. After SSI further demonstrated its ownership, Perforadora perpetuated its actions by appearing before the Ministerio Publico to illegally oppose the lawful return of SSI's property. In fact, Perforadora could have advised the Ministerio Publico at any time that it had no objection to the release of SSI's equipment.

The Court has reviewed Perforadora's financial status *in camera*. (Pl.'s Exh. P-92.) As a result of Perforadora's intentional and egregious conduct, the Court finds that SSI is entitled to punitive damages in the amount of $1,500,000, which amount will not substantially affect Perforadora's net worth.

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[41] The evidence illustrates that Correa had knowledge of SSI's ownership and relayed that information numerous occasions to Villalpandro, assistant to Perforadora's president. Thus, Perforadora is considered the wrongdoer.(*See In Re P&E Boat Rentals, Inc.*, 872 F.2d 642, 652 (5th Cir. 1989) (punitive damages may be imposed against a corporation when its top managerial employees are involved).)

F. Attorneys' Fees

Attorneys' fees are generally not recoverable in admiralty suits absent a contract or a statute granting this type of recovery. *Galveston County Navigation Dist. No. 1 v. Hopson Towing Co., Inc.*, 92 F.3d 353, 356 (5th Cir. 1996) (*citing Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 255-57 (1975); *Delta S.S. Lines, Inc.*, 747 F.2d at 1011). In *Galveston*, the Fifth Circuit addressed the history of attorneys' fees typically awarded in admiralty cases for abuse of the litigation process. (*Id.* at 356-59.) The court ultimately held that, "[n]ot acting 'in an equitable manner' does not support an award of attorneys' fees." (*Id.* at 359.) While an argument could be made that Perforadora abused the litigation process by fraudulently submitting SSI's equipment to the Ministerio Publico and refusing to file an affidavit of "no opposition" prior to this Court's order, the Court finds that Perforadora's actions contributed tot he underlying tort action. In other words, Perforadora's subsequent actions taken after the initial seizure were taken into account when the Court assessed punitive damages above.

Furthermore, there is no evidence that Perforadora's present counsel abused the litigation process. As a result, the Court finds that SSI, as the prevailing party, is not entitled to attorneys' fees for pursuing a tort action in admiralty.

Conclusion

For the reasons above, the Court finds that the accepted facts and law support a finding in favor of the plaintiff in the total amount of $4,255,606.96 resulting from

the defendant's conversion of the plaintiff's property while aboard the defendant's vessel. The itemized damages against the defendant include: (1) $289,734.62 in actual damages; (2) $48,211.84 in prejudgment interest; (3) consequential damages in the amount of $100,000 for the loss of the SEA OWL and $6,520.50 for additional custom charges; (4) $2,311,140 for loss of use/loss of earnings; and (5) $1,500,000 in punitive damages.

Each party shall bear their respective costs. A separate Final Judgment in accordance with this Bench Opinion shall issue this date.

DATED this the 19th day of July, A.D., 1999.

/S/ WALTER J. GEX, III
UNITED STATES DISTRICT JUDGE

APPENDIX E

July 19, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

CIVIL ACTION NO. 1:98cv251GR

SUBMERSIBLE SYSTEMS, INC.
PLAINTIFF

VS.

PERFORADORA CENTRAL, S.A. de C.V.
DEFENDANT

FINAL JUDGMENT

This cause came on for trial before the Court without a jury on June 14, 1999. Pursuant to the Bench Opinion entered in this cause, this date, incorporated herein by reference, it is hereby,

ORDERED AND ADJUDGED that a judgment in favor of the plaintiff for actual damages in the amount of $289,734.62 be, and is hereby, granted. It is further,

ORDERED AND ADJUDGED that a judgment in favor of the plaintiff for prejudgment interest in the amount of $48,211.84 be, and is hereby, granted. It is further,

ORDERED AND ADJUDGED that a judgment in favor of the plaintiff for consequential damages in the amount of $106,520.50 be, and is hereby, granted. It is further,

ORDERED AND ADJUDGED that a judgment in favor of the plaintiff for lost profits damages in the amount of $2,311,140 be, and is hereby, granted. It is further,

ORDERED AND ADJUDGED that a judgment in favor of the plaintiff for punitive damages in the amount of $1,500,000 be, and is hereby, granted. It is further,

ORDERED AND ADJUDGED that a judgment in favor of the plaintiff for attorneys' fees be, and is hereby, denied. It is further,

ORDERED AND ADJUDGED that a judgment in favor of the plaintiff is warranted in the total amount of $4,255,606.96. It is further,

ORDERED AND ADJUDGED that each party shall bear their respective costs.

SO ORDERED AND ADJUDGED this the 19th day of July, A.D. 1999.

/S/ WALTER J. GEX, III
UNITED STATES DISTRICT JUDGE

APPENDIX F

February 18, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

CIVIL ACTION NO. 1:98cv251GR

SUBMERSIBLE SYSTEMS, INC.
PLAINTIFF

VS.

PERFORADORA CENTRAL, S.A. de C.V.
DEFENDANT

MEMORANDUM OPINION

This cause comes before the Court on the motions for a new trial [144-1]; for an Order permitting the depositions of Captain Fernando Toledo Zepeda [Captain Toledo],[1] Juan Antonio de la Torre Magdaleno and Miguel Angel Bauza Zumoya [144-2]; to substitute the original affidavits of Captain Toledo, de la Torre, Bauza, and Fausto A. Correa Lepe[2] [145-1] [147-1]; for leave to file additional supporting translations [148-1]; and to open judgment and take additional

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[1] Captain Toledo was the captain of Perforadora's vessel at the time Perforadora seized SSI's equipment.

[2] Correa was the manager of Perforadora's marine operations at the time Perforadora seized SSI's equipment.

testimony in connection with the motion for new trial [154-1], filed by the defendant, Perforadora Central, S.A. de C.V. [Perforadora], pursuant to Rule 59 of the Federal Rules of Civil Procedure. Also, before the Court is Perforadora's *ex parte* motion to supplement the record [125-1]. Further, before the Court is a renewed motion for a writ of attachment [140-1] and a motion for an expedited hearing on the renewed motion for a writ of attachment [141-1], filed by the plaintiff, Submersible Systems, Inc. [SSI]. After due consideration of the evidence of record, the briefs of counsel, the applicable law, and being otherwise fully advised in the premises, the Court finds as follows.

Legal Analysis

I. Motions to Supplement the Record and for a Writ of Attachment

Prior to trial, Perforadora filed the instant *ex parte* motion to supplement the record with regard to SSI's application for an order of attachment. (Ct. R., Doc. 125.) After a Final Judgment was entered in favor of SSI, SSI filed the instant renewed motion for a writ of attachment and a motion for an expedited hearing on the matter. (Ct. R., Docs. 140, 141.) In response, Perforadora filed a motion to approve the appeal bond and stay execution of the Final Judgment. (Ct. R., Doc. 142.) Perforadora subsequently posted an appeal bond staying the execution of the Final Judgment pending the disposition of its motion for a new trial and the appellate process. (Ct. R., Doc. 146.) The Court therefore finds that Perforadora's motion to supplement the record and SSI's motions for a writ of attachment and an expedited hearing should be denied as moot.

II. Perforadora's Motions to Substitute the Original Affidavits of Captain Toledo, de la Torre, Bauza and Correa in Support of Motion for New Trial and for Leave to File Additional Supporting Translations

Rule 59(c) of the Federal Rules of Civil Procedure requires affidavits in support of a motion for a new trial to be filed with the motion. Upon filing the motion for a new trial, Perforadora simultaneously filed a motion to file faxed copies of Captain Toledo, de la Torre, Bauza and Correa's affidavits in support of its motion for a new trial. (Ct. R., Docs. 143, 144.) Within three days of the motion for a new trial, Perforadora filed the instant motion to substitute the original affidavits of Captain Toledo, de la Torre and Bauza. (Ct. R., Doc. 145.) Five days later, Perforadora filed the instant motion to substitute the original affidavit of Correa. (Ct. R., Doc. 147.) Thereafter, Perforadora filed the instant motion for leave to file additional supporting translations of the notarial certification and corporate charter of "Oceatec" contained in de la Torre's affidavit. (Ct. R., Doc. 148.) The Court subsequently entered an Order denying Perforadora's motion to file faxed copies of the affidavits in support of its motion for a new trial. (Ct. R., Doc. 149.)

Upon further review of the unique circumstances of this case, the Court finds that Perforadora should be allowed to substitute the original affidavits in place of the previously stricken faxed affidavits to be considered in connection with Perforadora's motion for a new trial. The Court therefore finds that Perforadora's motion to substitute the original affidavits of Captain Toledo, de la Torre, Bauza and Correa should be granted. The Court further finds that Perforadora's motion to file additional supporting translations with regard to de la Torre's affidavit should be granted.

III. Perforadora's Motion for a New Trial

Rule 59(a) of the Federal Rules of Civil Procedure provides, in relevant part, as follows:

> On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

Perforadora has the burden to show that a new trial is warranted. *Diaz v. Methodist Hosp.*, 46 F.3d 492, 495 (5th Cir. 1995).

As a basis for its new trial, Perforadora suggests that SSI presented false testimony. (Def.'s Mem. in sup. Of Mot. for New Trial, pp. 1-5.) In support, Perforadora submits the affidavits of Captain Toledo, de la Torre and Bauza, and requests that the Court reopen the Final Judgment in order to allow the depositions of those witnesses. Thus, Perforadora argues that their testimony constitutes newly discovered evidence.

A. Newly Discovered Evidence

When determining whether to grant or deny a new trial based upon newly discovered evidence, the Court must consider whether the moving party was excusably ignorant of facts that existed at the time of trial "despite using due diligence to learn about them;" whether the evidence "is merely cumulative or impeaching;" and more importantly,

whether such evidence would probably change the outcome of the prior trial. *Diaz*, 46 F.3d at 492; *See also* 11 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 2808 pp. 86-94 (1995). The Court has wide discretion in deciding whether to grant or deny a new trial, and will only be reversed for "a clear abuse of discretion." *Diaz*, 46 F.3d at 495 (citations omitted).

1. Testimony of de la Torre and Bauza

Perforadora initially alleges that the President and owner of SSI, Wolfgang Burnside, "testified falsely, or perhaps even perjuriously, when he claimed that SSI had contracted with Oceatec...but that 'the contract didn't come through' because of the unavailability of the MAX ROV." (Def.'s Mem. In Sup. Of Mot. for New Trial, pp. 1-2 *citing* Tr., pp. 105-06, 191-94; Pl.'s Exh. P-80.) In support, Perforadora offers the affidavits of de la Torre and Bauza, employees of Oceatec, claiming that the contract between Oceatec and SSI did not materialize because Oceatec did not ultimately win a bid for inspection services related to a drilling contract with another Mexican corporation. (Ct. R., Doc. 145, Exh. 1, pp. 10-2; Exh. 2, pp. 1-2.) Thus, Perforadora claims that SSI's accounting expert, George Panzeca, incorrectly calculated SSI's lost profits by basing his "high case scenario" on the existenee of the Oceatec contract. (Def.'s Mem. in Sup. Of Mot. for New Trial, p. 2 *citing* Tr., pp. 511-12.)

In contrast, the evidence before the Court indicates that Burnside testified consistently at both his deposition and at trial that SSI submitted a formal quote to Oceatec in February of 1997 that never materialized into a formal contract because the MAX ROV was being utilized on the Quantum contract.

(Ct. R., Doc. 151, Exh. A, pp. 144-147; Tr., pp. 105-06, 191-195; Pl.'s Exh. P-80; Def.'s Exh. D-34.) Perforadora failed to question Burnside's interpretation of events at either his deposition or at trial. Nevertheless, the Court finds that the testimony of de la Torre and Bauza should have been obtained after Burnside's deposition and prior to trial. Even if the contract between SSI and Oceatec failed to materialize solely as a result of Oceatec's failure to receive a winning bid, de la Torre and Bauza's testimony is merely cumulative in that it confirms Burnside's testimony that the Oceatec contract was not awarded to SSI. At best, the testimony would only be used to impeach Burnside's recollection of events. Such impeachment, by itself, is not a ground for awarding a new trial. *Diaz*, 46 F.3d at 495-96.

More importantly, Panzeca testified at trial that he did not base his loss profit calculation "upon an analysis of contracts either past, pending or future." (Tr., p. 512.) Instead, he based the calculations "upon the actual historical results of operations of [SSI] and the time period immediately prior to the seizure." (*Id.*) After Panzeca gave the Court a high and low range for calculating lost profits, the Court awarded SSI lost profit damages under the lowest case scenario. (*See* T. R., Doc. 138, pp. 29-30 *citing* Tr., pp. 496-98; Pl.'s Exh. P-86, Chart 2.) Assuming *arguendo* that Panzeca considered SSI's proposal to Oceatec as a contract, such consideration would only affect the high range calculations which the Court did not use.

Thus, de la Torre and Bauza's affidavits do not change the ultimate outcome of the Court's finding regarding lost profits. Likewise, any deposition testimony of de la Torre and Bauza, even if consistent with their depositions, would not alter the outcome of the Court's finding on lost profits. For

the reasons above, the Court finds that de la Torre and Bauza's testimony is insufficient to warrant a new trial.

2. Testimony of Captain Toledo

Perforadora further alleges that Michael Carlisle, SSI's former employee, falsely testified at trial that Captain Toledo informed him that SSI's equipment had been seized for the purpose of bringing pressure against Quantum for payment of money due Perforadora. (Def.'s Mem. in Sup. Of Mot. for New Trial, p. 4 *citing* Tr., pp. 40, 43.) In support, Perforadora now offers the affidavit of Captain Toledo whereby he denies that he made such a statement to Carlisle. (Ct. R., Doc. 145, Exh. 5, p. 4.) Perforadora also refers to excepts from Carlisle's deposition testimony indicating that he was initially unsure of who told him that the equipment had been seized. (Def.'s Exh. D-54, pp. 70-72.) Thus, Perforadora suggests that Carlisle changed his testimony at trial when he discovered that the captain could not be found. (Def.'s Mem. in Sup. Of Mot. for Summ. J., pp. 4-5.) The Court finds to the contrary.

In its post-trial memorandum, Perforadora argued that Carlisle inconsistently testified at his deposition regarding the incidents surrounding the seizure of SSI's equipment. The Court rejected this argument in its Bench Opinion by finding Carlisle's testimony to be consistent and credible. For instance, SSI initially submitted Carlisle's affidavit on or about September 4, 1998, whereby Carlisle claimed that Perforadora had seized SSI's equipment. (Pl.'s Resp. to Def.'s Mot. to Dismiss Admiralty Juris., Exh. A, pp. 3-4.) At his deposition in February of 1999, Carlisle testified that he thought the captain was the Perforadora employee who woke him and informed his of the seizure. (Pl.'s Exh. P-96,

pp. 73, 139; Def.'s Exh. D-54, pp. 70-72.) During the trial in June of 1999, Carlisle's testimony went unrefutted[3] and was consistent with his previous affidavit and deposition testimony. (*See* Tr., p. 40.) A subsequent review of the evidence of record reveals no inconsistency in Carlisle's testimony.

Throughout the course of this action, Perforadora failed to present Captain Toledo as a witness claiming that he was nowhere to be found. Ironically, Correa was able to locate Captain Toledo on July 26, 1999, within seven days of the Bench Opinion and Final Judgment being rendered by this Court. (Ct. R., Doc. 138; Doc. 139; Doc. 147, Exh. 1, ¶ 8.) Thereafter, Correa submitted an affidavit in connection with the instant motion for a new trial, whereby he now claims that he diligently attempted to locate Captain Toledo prior to trial but his efforts were to no avail. (Ct. R., Doc. 147, Exh. 1, p. 2.)[4] Not only is the timing and substance of Correa's affidavit highly suspicious but the Court previously found Correa's testimony to lack any credibility. After reviewing the records and Correa's affidavit, the Court finds his efforts to locate Captain Toledo to be insufficient. More importantly, Perforadora knew about Carlisle's testimony since September of 1998, and therefore could not have been excusably ignorant of his testimony at the time of trial.

Like Correa's testimony at trial, Captain Toledo's affidavit also lacks any credibility because he states that he believed the equipment belongs to Quantum. This assertion

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[3] Perforadora did not cross Carlisle on this issue at trial.

[4] Correa provided telephone records and a telegram transmittal form as purported evidence of his due diligence. (*Id.* at pp. 4-9.)

is contrary to the multitude of evidence indicating otherwise, i.e. the color and logos on SSI's coveralls and equipment, the SSI employees aboard the ship, *et cetera*. Further, a glaring omission in Captain Toledo's affidavit is that he does not deny that SSI's equipment was seized by Perforadora's personnel while aboard Perforadora's vessel. Instead, Captain Toledo claims that "he" neither informed Carlisle of the seizure nor ordered the padlocks to be placed on SSI's equipment. The Court finds that Captain Toledo's affidavit and potential testimony are simply cumulative of Perforadora's denial of the seizure. Even if Captain Toledo's testimony were true, such testimony would not alter the ultimate outcome of the trial because the overwhelming evidence indicates that SSI's equipment was seized and retained by Perforadora as a means of seeking payment from Quantum. For these reasons, the Court finds that Captain Toledo's untimely testimony is insufficient to warrant a new trial.

3. Conclusion Regarding Perforadora's Purported Newly Discovered Evidence

Perforadora simply does not have any newly discovered evidence that would warrant a new trial. As stated above, the plaintiff did not exercise due diligence in obtaining the testimony of Captain Toledo, de la Torre or Bauza. More importantly, even if their testimony were true, such testimony would not change the ultimate outcome of the Court's Final Judgment. The Court therefore finds that Perforadora's motion for a new trial based upon newly discovered evidence is without merit, and should be denied.

B. Additional Reasons in Support of Perforadora's Motion for a New Trial

1. Prejudgment Interest

The Court previously awarded SSI the reasonable replacement value of its equipment. Perforadora argues that the Court erred in awarding SSI prejudgment interest after granting the replacement value. As noted in the Court's Bench Opinion, the general rule in admiralty cases is that prejudgment interest is awarded unless "peculiar circumstances" make it inequitable. *Cantieri Navali Riuniti v. M/V SKYPTRON*, 802 F.2d 160, 165 (5th Cir. 1986); *Ryan Walsh Stevedoring Co., Inc. v. James Marine Servs., Inc.*, 792 F.2d 489, 492 (5th Cir. 1986) (citations omitted). Prejudgment interest may even be awarded when damages are based on the replacement value of property. *Interpool Ltd. v. Bernuth Agencies, Inc.*, 959 F. Supp. 644, 651 (S.D.N.Y.) *aff'd* 129 F.3d 113 (1997); *CEH, Inc. F/V SEAFARER*, 880 F. Supp. 940, 951-54 (D.R.I.) *aff'd* 70 F.3d 694 (1995). Thus, Perforadora has failed to identify and peculiar circumstances which would justify a departure from the general rule.

Moreover, the Court has broad discretion to determine how much prejudgment interest should be awarded. *Cantieri, supra*, 802 F.2d at 165 (citation omitted). In its Bench Opinion, the Court exercised its discretion and awarded SSI prejudgment interest at a rate of 8% per annum from the date Perforadora seized SSI's equipment until the date of judgment. Perforadora has failed to demonstrate how this Court erred in exercising its discretion. Regardless, the Court finds that its award of prejudgment interest to SSI is an insufficient reason to grant Perforadora a new trial.

2. Applicability of Mexican Law

Once again, Perforadora's suggests that this Court is attempting to regulate the internal affairs of the Republic of Mexico. The Court has previously rejected this argument on numerous occasions. As noted in the Bench Opinion, Perforadora illegally seized SSI's property while aboard its vessel and converted the equipment in an effort to exert pressure on Quantum for the arrearage owed from Quantum to Perforadora. Perforadora argues that under Mexican law, even if the original seizure was improper, that turning the equipment over to the Ministerio Publico exonerated Perforadora from further liability. (Def.'s Mem. in Sup. Of Mot. for New Trial, pp. 6-7.) The Court finds this defense to be without merit.

The legal experts on Mexican law for both parties testified that Perforadora acted illegally by untimely submitting the equipment to the Ministerio Publico, and would have acted illegally by submitting the equipment upon misrepresented facts. (Tr., pp. 384-85, 406, 408, 431-33, 457, 461-63, 466-473.) In its Bench Opinion, the Court specifically found that Perforadora untimely submitted the equipment to the Ministerio Publico under false pretenses. The Court's finding only reinforces the fact the Perforadora intentionally and maliciously seized and converted SSI's equipment solely as a means of receiving payment from Quantum. It is simply not an attempt by this Court to delve into the internal affairs of the Republic of Mexico.

3. Punitive Damages

The Court also awarded SSI punitive damages as a result of Perforadora's intentional and malicious behavior with

regard to SSI's property. Perforadora argues that punitive damages are not recoverable because Mexican law does recognize such recovery. The Court has previously addressed this issue and found that punitive damages are allowed under American law for admiralty actions involving torts. (*See* Ct. R., Doc. 129, p. 3.) The Court therefore finds that Perforadora's argument is without merit.

Perforadora also asserts that the intentional action of Correa should not be imputed to the company because he was not part of the upper echelon of management. As support, Perforadora cites a case whereby the Fifth Circuit refused to award punitive damages against Chevron when two of its "lower echelon" employees, a construction foreman and a transportation foreman, ordered Chevron chartered boats to run in the fog and an accident subsequently occurred. *In Re P&E Rentals, Inc.*, 872 F. 2d 642, 652-53 (5th Cir. 1989). The Court held that liability could not be imputed to Chevron because the two employees neither exercised policy making authority on behalf of the company nor were their acts ratified by Chevron. (*Id.*)

Unlike the two foremen in *P&E boat Rentals*, Correa was the manager of Perforadora's marine operations who reported daily to Jorge Villalpando, assistant to Perforadora's president. (Tr., pp. 263-64, 293-94.) Correa had knowledge of SSI's ownership and relayed that information to Villalpando on numerous occasions. (Tr., pp. 272-74, 289, 325; Pl.'s Exh. P-21.) Villalpando admitted that he spoke directly with Perforadora's president about an interoffice memorandum submitted by Correa that identified SSI as the true owner of the equipment (Tr., p. 284.) A review of the evidence also indicates that Correa was given direct authority to act on Perforadora's behalf. (Tr., pp. 272, 287.) At the very least,

Perforadora ratified the acts of Correa by filing an opposition to SSI's request to release the equipment with full knowledge that the equipment belonged to SSI.

Simply put, this case is not even remotely analogous to *P&E Boat Rentals*. Correa was not lower echelon management. His actions were ratified by Perforadora through Villalpando and Perforadora's president. More importantly, Perforadora had direct knowledge of the wrongful seizure and failed to correct their actions. Instead, Perforadora continued the wrongful seizure by instituting false and misleading pleadings. The Court therefore finds that the intentional and malicious acts of Correa, Villalpando, Perforadora's president and its attorney, are attributable to Perforadora and justify an award of punitive damages against Perforadora.

4. Lost Profits

Perforadora asserts that Panzeca failed to follow generally accepted accounting principles for his use of a profit figure which ignored SSI's bad debt of $700,000 and relied on the Oceatec contract. The Court finds Perforadora's argument to be without merit. As noted in the Bench Opinion, the Court accepted Panzeca's loss of profit calculations which excluded both the bad debt and the expenses associated with that debt. (Ct. R., Doc. 138, pp. 29-30.) As previously stated, Panzeca did not rely on the Oceatec contract, and even if he did, it only affected the higher case scenario which the Court did not use. For these reasons, the Court finds that Perforadora's argument is without merit.

5. Loss of the Sea Owl

Perforadora further asserts that the Court should not have awarded damages attributed to the loss of the SEA OWL. Perforadora appears to argue that it cannot be held liable because it did not physically cause the SEA OWL's tether to break. That argument simply misses the point. Without the MAX ROV on location, SSI could not retrieve the SEA OWL. Burnside testified without any reliable opposition that if SSI's MAX ROV had been available, the SEA OWL would have been recovered. (Tr., p. 226.) The Court therefore reiterates its finding that SSI lost the SEA OWL as a direct result of Perforadora's seizure of SSI's MAX ROV.

6. Venue

Finally, Perforadora argues that the Court erred in holding that Perforadora's filing of a counterclaim waived its objection to venue. The Court notes that venue is an issue for appeal, not a new trial. Regardless, the Court previously found that jurisdiction and venue are proper in the Southern District of Mississippi based upon Perforadora's contacts and admissions. Thus, the Court property exercised its jurisdiction over this case in this district.

7. Conclusion Regarding Perforadora's Additional Reasons

Perforadora has failed to offer any other valid reason for the Court to grant a new trial. Instead, Perforadora has offered several meritless arguments that have previously been addressed and are inconsistent with the record before the Court. The Court therefore finds that Perforadora's motion for a new trial should be denied.

IV. Motions to Open Judgment and to Take the Depositions of Captain Toledo, de la Torre, and Bauza

As noted above, Perforadora was allowed to supplement the record with the original affidavits of Captain Toledo, de la Torre and Bauza in support of its motion for a new trial. After reviewing the affidavits, the Court finds that any possible testimony from these witnesses would not alter the ultimate outcome of the case and would only prolong the inevitable. The Court therefore finds that Perforadora's motions to open the Final Judgment and to take additional testimony, including the depositions of Captain Toledo, de la Torre and Bauza, should be denied.

Conclusion

For the reasons above, the Court finds that Perforadora's motion to supplement the record and SSI's motions for a writ of attachment and for an expedited hearing should be denied as moot. Also, the Court finds that Perforadora's motions to substitute the original affidavits of Captain Toledo, de la Torre, Bauza and Correa, and to file additional supporting translations with regard to de la Torre's affidavit, should be granted.

More importantly, the Court finds that Perforadora's motion for a new trial should be denied. The Court further finds that Perforadora's motion to open the Final Judgment and to take additional testimony should be denied. Thus, the Court finds that Perforadora's motion for an order permitting the depositions of Captain Toledo, de la Torre and Bauza, should be denied. Each party shall bear their respective costs.

A separate Order in accordance with this Memorandum

Opinion shall issue this date.

THIS the 18th day of February, A.D., 2000.

/S/ WALTER J. GEX, III

UNITED STATES DISTRICT JUDGE

APPENDIX G

February 18, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

CIVIL ACTION NO. 1:98cv251GR

SUBMERSIBLE SYSTEMS, INC.
PLAINTIFF

VS.

PERFORADORA CENTRAL, S.A. de C.V.
DEFENDANT

ORDER

This cause comes before the Court on the *ex parte* motion to supplement the record [125-1]; the motions for a new trial [144-1]; for an Order permitting the depositions of Captain Fernando Toledo Zepeda [Captain Toledo], Juan Antonio de la Torre Magdaleno and Miguel Angel Bauza Zumoya [144-2]; to substitute the original affidavits of Captain Toledo, de la Torre, Bauza, and Fausto A. Correa Lepe [145-1][147-1]; for leave to file additional supporting translations [148-1]; to open judgment and take additional testimony in connection with the motion for new trial [154-1] filed by the defendant, Perforadora Central, S.A. de C.V. Further, before the Court is a renewed motion for a writ of attachment [140-1] and a motion for an expedited hearing on the renewed motion for a writ of attachment [141-1], filed by the plaintiff, Submersible Systems, Inc. Pursuant to the

Memorandum Opinion entered in this cause, this date, incorporated herein by reference, it is hereby,

ORDERED AND ADJUDGED that the defendant's *ex parte* motion to supplement the record [125-1] be, and is hereby, denied as moot. It is further,

ORDERED AND ADJUDGED that the plaintiff's renewed motion for a writ of attachment [140-1] and its motion for an expedited hearing on the renewed motion for a writ of attachment [141-1] be, and are hereby, denied as moot. It is further,

ORDERED AND ADJUDGED that the defendant's motion for a new trial [144-1] be, and is hereby, denied. It is further,

ORDERED AND ADJUDGED that the defendant's motion for an Order permitting the depositions of Captain Toledo, de la Torre and Bauza [144-2] be, and is hereby, denied. It is further,

ORDERED AND ADJUDGED that the defendant's motion to open judgment and take additional testimony in connection with the motion for new trial [154-1] be, and is hereby, denied. It is further,

ORDERED AND ADJUDGED that the defendant's motion to substitute the original affidavits of Captain Toledo, de la Torre and Bauza [145-1] be, and is hereby, granted. It is further,

ORDERED AND ADJUDGED that the defendant's motion to substitute the original affidavit of Correa [147-1] be, and is hereby, granted. It is further,

ORDERED AND ADJUDGED that the defendant's motion for leave to file additional supporting translations [148-1] with regard to the notarial certification and corporate charter of "Oceatec" contained in de la Torre's affidavit be, and is hereby, granted. It is further,

ORDERED AND ADJUDGED that each party shall bear their respective costs in connection with these motions.

SO ORDERED AND ADJUDGED this the 18th day of February, A.S., 2000.

/S/ WALTER J. GEX, III
UNITED STATES DISTRICT JUDGE

APPENDIX H

United States Court of Appeals,
Fifth Circuit.

SUBMERSIBLE SYSTEMS, INC.,
Plaintiff-Appellee-Cross-Appellant

v.

PERFORADORA CENTRAL, S.A. de C.V.,
Defendant-Appellant-Cross-Appelle.

No. 99-60591

May 4, 2001.

Appeals from the United States District Court for the Southern District of Mississippi.

Before FARRIS*, E. GRADY JOLLY and W. EUGENE DAVIS, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Submersible Systems, Inc. ("SSI") sued Perforadora Central, S.A. de C.V. ("Central") in the Southern District of Mississippi for the conversion of some of its equipment aboard a vessel owned by Central while that vessel was docked in a Mexican port. Following a bench trial, the district court awarded SSI more than $4.25 million in damages. Because the district court did not have personal

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* Circuit Judge of the Ninth Circuit, Sitting by designation.

jurisdiction over Central, we vacate the judgment of the district court and remand with instructions to dismiss this case.

I.

SSI is a Louisiana corporation that operates small, remotely-operated, submersible vehicles used in underwater inspection, construction, and surveying. In the latter part of 1996, SSI contracted with Quantum Ingenieros, S.A. de C.V. ("Quantum") to provide the submersible vehicles for Quantum's inspection of certain oil and gas pipelines located in Mexican waters. As part of this project, Quantum also contracted with Central to transport the equipment, including SSI's submersible vehicles, and the personnel to be used to inspect the pipelines. To carry out this contract, Central dispatched the M/V DON FRANCISCO to Morgan City, Louisiana in November of 1996 to pick up SSI's equipment and transport it to its destination in Mexico.

Quantum was late paying both SSI and Central for their services, and Central twice brought its vessel back to port during the early months of 1997 to force Quantum to pay what it owed. By early June of 1997 Quantum owed both SSI and Central substantial sums for their services on the pipeline inspection project. As a result of Quantum's indebtedness, Quantum and Central agreed to end the charter of the DON FRANCISCO on June 23, 1997 and on that day the DON FRANCISCO returned to the port of Dos Bocas, Mexico. At that time, SSI had two employees, one of its submersible vehicles, and some other related equipment on board the DON FRANCISCO. All of SSI's equipment was clearly marked as belonging to SSI.

At about 9 am on the morning of the 23rd, the captain of the DON FRANCISCO woke the two SSI employees and told them that SSI's equipment had been seized to force Quantum to pay Central what it was owed for the charter of its vessel. Shortly thereafter, one of Central's agents boarded the vessel and inspected the immigration papers of the two SSI employees. Seeing that they were out of order, the agent reported the two men to the Mexican immigration authorities. The two SSI employees then left the vessel and spent the day getting their immigration papers in order. While they were gone, Central offloaded SSI's equipment from the DON FRANCISCO and put it into a locked yard at the port.

Wolfgang Burnside, the owner of SSI, arrived in Mexico on June 26, 1997 to demand the release of SSI's equipment. Central refused to release the equipment and instead deposited it with the Mexican Ministerio Publico. In later proceedings before the Ministerio Publico, Central asserted that the seized equipment belonged to Quantum and should be held pending an investigation of Quantum for its failure to pay its debts. Central was eventually appointed custodian of SSI's equipment for the Ministerio Publico and moved the equipment to Central's yard in Ciudad del Carmen, Mexico, where it was exposed to the elements.

After SSI filed this lawsuit, Central released the equipment in March of 1999 and SSI transported it back to the United States. However, because of prolonged exposure to the elements, the equipment had been rendered worthless.

II.

While it was attempting to get Central to return its property, SSI discovered that Central was building a marine

drilling rig at the TDI Halter shipyard in Pascagoula, Mississippi. SSI then filed suit in the southern district of Mississippi, in May of 1998, for the conversion of its equipment by Central. SSI's suit invoked both the admiralty jurisdiction and the diversity jurisdiction of the district court. SSI prayed for attachment of the rig, pursuant to Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims or pursuant to > Rule 64 of the Federal Rules of Civil Procedure and Mississippi law.

Central responded to the suit by moving to dismiss for lack of personal jurisdiction. Central argued that given the nature of the suit, it had insufficient contacts with Mississippi to subject it to suit in Mississippi. Central argued against attachment of its rig pursuant to Rule B by arguing that the district court had no admiralty jurisdiction, or in the alternative that it could be found within the southern district of Mississippi and so attachment under Rule B would be improper. Central argued against attachment pursuant to > Rule 64 and Mississippi law on the grounds that it was not subject to suit in Mississippi. Central also moved to dismiss on the grounds of *forum non conveniens*.

The district court denied both motions. It ruled that the nature of Central's contacts with Mississippi made it subject to suit in Mississippi. The district court ruled that admiralty jurisdiction existed in this case, but denied attachment under Rule B on two separate grounds. The district court first held that as Central was subject to jurisdiction in the southern district of Mississippi, it could also be found within the southern district of Mississippi. The district court next held, in the alternative, that SSI had not filed the affidavit required by Rule B regarding SSI's efforts to locate Central within the southern district of Mississippi.

Having found Central subject to suit in Mississippi, the district court allowed attachment of Central's rig pursuant to > Rule 64 so long as SSI posted a $1 million bond.[1] Concerning the *forum non conveniens* issue, the district court found that Mexico did not provide a civil remedy for conversion, and thus was not an adequate alternative forum. In ruling on both motions, the district court also ruled that United States general maritime law, and not Mexican law, should apply to the case.

Following a three day bench trial, the district court found that Central had converted SSI's equipment. The district court awarded SSI actual damages of $289,734.62, pre-judgment interest of $48,211.84, consequential damages of $106,520.50, lost profits of $2,311,140.00, and punitive damages of $1,500,000.00. Central moved for a new trial on the grounds that it had newly discovered evidence from the captain of the DON FRANCISCO concerning the events of June 23, 1997. The district court denied the motion, holding that the captain's testimony was not credible, and that it was suspicious that he was located just a few days following the trial after being missing since the incident on June 23, 1997. Central then took this appeal.

Central argues on appeal that, 1) it is not subject to personal jurisdiction in Mississippi, 2) the district court has no admiralty jurisdiction in this case, 3) the district court should have dismissed this case on the grounds of forum non conveniens, 4) the district court should have applied Mexican law to this case, 5) the district court erred in its damages calculations in several respects, and 6) the district court should have granted it a new trial. SSI cross-appeals for an award of

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[1] SSI never posted the bond and so never perfected its attachment.

its costs and for attachment of Central's rig should we find that the district court did not have jurisdiction over Central.

III.

We begin with the issue we find dispositive, namely whether the district court had jurisdiction over Central. Because the facts concerning Central's contacts with Mississippi and the United States are undisputed, the issue of personal jurisdiction in this case presents a question of law that we review de novo. > World Tanker Carriers Corp. v. M/V YA MAWLAYA, 99 F.3d 717, 720 (5th Cir.1996).

A.

> [1]> [2] Absent a federal statute that provides for more expansive personal jurisdiction, the personal jurisdiction of a federal district court is coterminous with that of a court of general jurisdiction of the state in which the district court sits. > Fed.R.Civ.P. 4(k)(1). For a federal district court in a particular state to exercise personal jurisdiction over a defendant, that exercise of jurisdiction must first be proper under that state's long-arm statute. If the state long-arm statute allows the district court to exercise personal jurisdiction, the exercise of personal jurisdiction must also be proper under the Due Process Clause of the Fourteenth Amendment.

> [3]> [4] The Mississippi long-arm statute provides, in relevant part,

Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the Constitution and laws of this state as to doing business herein, who shall make a contract with a resident of this state to be

performed in whole or in part by any party in this state, or who shall commit a tort in whole or in part against a resident or nonresident of this state, or who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi and shall thereby be subjected to the jurisdiction of the courts of this state.

Miss.Code § 13-3-57. A plaintiff who is not a resident of Mississippi, such as SSI, may not take advantage of the contract portion of the Mississippi long-arm statute. > Lifeline Ambulance Services, Inc. v. Laidlaw, Inc., 16 F.Supp.2d 686, 688 (S.D.Miss.1998). Any tort committed by Central in this case was committed solely in Mexico. Thus, SSI may not take advantage of the tort portion of the Mississippi long-arm statute. By arranging to have a drilling rig built in a shipyard in Pascagoula, it could be argued that Central did business in Mississippi. However, a non-resident plaintiff like SSI may not take advantage of the doing business portion of the Mississippi long-arm statute. > Herrley v. Volkswagen of America, Inc., 957 F.2d 216, 218 (5th Cir.1992); > Smith v. DeWalt Prods. Corp., 743 F.2d 277, 279 (5th Cir.1984); > Lifeline, 16 F.Supp.2d at 688. Thus, Central is not subject to the personal jurisdiction of the Mississippi courts under the Mississippi long-arm statute.

> [5]> [6] Nor would a district court's exercise of personal jurisdiction over Central in Mississippi comport with the requirements of the Due Process Clause of the Fourteenth Amendment. Due process requires that a foreign corporate defendant, "establish sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which [the

defendant] has incurred there." > International Shoe Co. v. Washington, 326 U.S. 310, 320, 66 S.Ct. 154, 90 L.Ed. 95 (1945); > Shaffer v. Heitner, 433 U.S. 186, 207, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977). An exercise of personal jurisdiction, even when a foreign corporate defendant has established sufficient contacts with a forum, must also be reasonable in light of the forum's interest in the litigation in question. > Asahi Metal Indus. Co., Ltd. v. Superior Court of California, Solano County, 480 U.S. 102, 113-14, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987).

> [7]> [8] The extent of the contacts that a foreign corporate defendant must establish with a forum to satisfy due process concerns differs depending on the nature of the litigation. In this case, Central's contacts with the state of Mississippi are wholly unrelated to SSI's claim that Central converted SSI's equipment in Mexico. When a plaintiff's claim does not arise out of a defendant's contacts with a forum, then the defendant's contacts with the forum must be, "continuous and systematic" to satisfy the requirements of due process. > Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 416, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984); > Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 445, 72 S.Ct. 413, 96 L.Ed. 485 (1952); > Wilson v. Belin, 20 F.3d 644, 647 (5th Cir.1994).

> [9] As commentators have recognized, the continuous and systematic contacts test is a difficult one to meet, requiring extensive contacts between a defendant and a forum. 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 108.41[3] (3d ed.1999). The Supreme Court has upheld an exercise of personal jurisdiction when the suit was unrelated to the defendant's contacts with a forum only once. Id. Purchasing equipment in a forum and

traveling to that forum on related business are, without more, insufficient to confer personal jurisdiction when the plaintiff's cause of action does not arise out of those purchasing activities. > Helicopteros, 466 U.S. at 417, 104 S.Ct. 1868.

Central's only contacts with the state of Mississippi grow out of its construction of a marine drilling rig at the TDI Halter shipyard in Pascagoula. Central contracted with TDI Halter for the construction of the rig, and also maintained an office at the shipyard with three employees to monitor the construction.[2] These are not the sort of continuous and systematic contacts that would allow the district court to take jurisdiction over Central in this case.

In > Helicopteros, the Supreme Court considered a tort claim against a Colombian helicopter operator arising out of a helicopter crash in Colombia. The Colombian company had negotiated a contract in Houston, Texas to provide for the services that led to the crash. The Colombian company had

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[2] SSI has argued that Central conceded personal jurisdiction in its opposition to attachment of the drilling rig under Rule B. Central did admit, as part of that opposition, to the contacts with Mississippi which are discussed above. Central argued that those contacts meant that it could be found within the Southern District of Mississippi and so attachment under Rule B would be improper. However, Central specifically stated that it was not thereby conceding the issue of personal jurisdiction outside of the context of Rule B attachment. Central stated, "Perforadora does not dispute that the presence of the rig in the district itself is sufficient to satisfy general personal jurisdiction in the district for the purposes of Rule B as Rule B is not subject to common law due process constraints. Maritime attachment warrants consideration of a more flexible application of the doctrines of due process consistent with its historical functions." 4th Supplemental R. at 80 (emphasis added). Whether Central is correct or not concerning what due process requires in the Rule B attachment context, Central cannot be said to have conceded the issue of personal jurisdiction.

also purchased about 80% of its fleet of helicopters from a Texas company, had sent its pilots to Texas for training, had sent members of its management to Texas for technical consultations in connection with the purchase of its fleet, and had accepted payment for the services that led to the crash in funds drawn on a Texas bank. In spite of all these contacts with the state of Texas, the Supreme Court held that they were insufficient to allow the Texas courts to take jurisdiction over the Colombian company, considering that
the litigation was unrelated to the company's contacts with Texas. > Id. at 416, 104 S.Ct. 1868. In this case, Central, a Mexican company that has its headquarters in Mexico and that does business almost exclusively in Mexico, made contact with Mississippi only by virtue of its arrangement to construct one marine drilling rig in a shipyard in Mississippi. These contacts with Mississippi are even less substantial than those of the Colombian company with Texas in > Helicopteros.

The Mississippi long-arm statute does not allow a federal district court sitting in Mississippi to take jurisdiction over Central in this case. Even if it did, such an exercise of personal jurisdiction would be inconsistent with the due process clause of the Fourteenth Amendment.

B.

> [10] SSI argues, as an alternative ground for supporting the judgment entered by the district court in its favor, that > Federal Rule of Civil Procedure 4(k)(2) authorized the district court to assume jurisdiction over Central.

> Rule 4(k)(2) provides,

If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the courts of general jurisdiction of any state.

Our court has previously held that claims falling within the admiralty jurisdiction of the federal courts are claims arising under federal law for the purposes of > Rule 4(k)(2). > World Tanker, 99 F.3d at 722-23.[3]

> Rule 4(k)(2) applies to actions in which a federal court draws its authority directly from federal law, and does not borrow it from state law. The due process required in federal cases governed by > Rule 4(k)(2) is measured with reference to the Fifth Amendment, rather than the Fourteenth Amendment. That is, > Rule 4(k)(2) requires us to consider Central's contacts with the United States as a whole, and not just Central's contacts with the state of Mississippi. > Id. at 720; > Busch v. Buchman, Buchman & O'Brien, 11 F.3d 1255, 1258 (5th Cir.1994); > United States v. Swiss Am. Bank, Ltd., 191 F.3d 30, 36 (1st Cir.1999). If Central has sufficient contacts with the United States, then the district court could have exercised jurisdiction over Central pursuant to > Rule 4(k)(2).

In analyzing Central's contacts with the United States, we must keep in mind that this case does not arise out of Central's contacts with the United States. All the events constituting Central's conversion of SSI's equipment--the

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[3] We find Central's contention that the district court lacked admiralty jurisdiction in this case to be without merit.

seizure aboard the DON FRANCISCO, the unloading of the equipment at the port of Dos Bocas, and the proceedings before the Mexican Ministerio Publico--took place in Mexico. Therefore, Central's contacts with the United States must be, "continuous and systematic" to have allowed the district court to take jurisdiction over Central pursuant to > Rule 4(k)(2). > Consolidated Dev. Corp. v. Sherritt, Inc., 216 F.3d 1286, 1292 (11th Cir.2000); > BP Chems., Ltd. v. Formosa Chem. & Fibre Corp., 229 F.3d 254, 262-63 (3rd Cir.2000).

The record reflects very few contacts between Central and the United States other than those related to the construction of the rig in Pascagoula. Central has an account at a Houston bank and sends some employees to an offshore drilling conference in Houston every year. Central has purchased spare parts and vessels in the United States, though to what extent is not clear from the record. Central's vessels have also occasionally called on United States ports. These contacts with the United States are, at best, sporadic and of small consequence. Central conducts no operations in the United States, maintains no office in the United States (other than the one which is maintained solely to oversee construction in Pascagoula), and owns no real or personal property located in the United States.

Because Central's contacts with the United States are not continuous and systematic, the district court had no authority to assume jurisdiction over Central pursuant to > Rule 4(k)(2).

C.

> [11] SSI, as part of its cross-appeal, has argued that if we find that the district court lacks personal jurisdiction over Central then we should order attachment of Central's rig under construction in Pascagoula pursuant to Rule B and otherwise enforce the judgment entered by the district court. As we have explained, the district court did not have jurisdiction over Central. Nevertheless, we decline to order attachment of Central's rig pursuant to Rule B.

Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims provides, in relevant part,

In an in personam action:

(a) If a defendant is not found within the district, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property--up to the amount sued for--in the hands of garnishees named in the process.
(b) The plaintiff or the plaintiff's attorney must sign and file with the complaint an affidavit stating that, to the affiant's knowledge, or on information and belief, the defendant cannot be found within the district.

Rule B allows a district court to take jurisdiction over a defendant in an admiralty or maritime action by attaching property of the defendant. > Great Prize, S.A. v. Mariner Shipping Pty., Ltd., 967 F.2d 157, 159 (5th Cir.1992). We have interpreted the requirement of Rule B that the defendant not, "be found within the district" as meaning that the defendant is neither subject to the jurisdiction of the district court nor amenable to service of process within the district. > Heidmar, Inc. v. Anomina Ravennate Di Armamento

Sp.A. of Ravenna, 132 F.3d 264, 268 (5th Cir.1998); > LaBanca v. Ostermunchner, 664 F.2d 65, 67 (5th Cir.1981).

The district court gave two grounds for denying SSI's motion to attach the rig pursuant to Rule B. The district court held that Central could be found within the Southern District of Mississippi because its contacts with Mississippi made it subject to jurisdiction there. The district court also held that SSI did not submit the affidavit required by Rule B stating that Central could not be found within the Southern District of Mississippi. As discussed above, we disagree with the district court's conclusion that Central's contacts were sufficient to permit it to exercise jurisdiction over this action. Thus, the district court erred in concluding that Central would be found within the Southern District of Mississippi for the purposes of Rule B. However, that conclusion does not mean that the district court erred in refusing to attach Central's rig pursuant to Rule B.

Rule B requires that a plaintiff seeking attachment pursuant to Rule B file an affidavit, as well as a verified complaint, concerning the presence of the defendant within the district in which the action is filed. As the district court held, and as our review of the record confirms, SSI did not file the required affidavit with its verified complaint when it sought attachment of Central's drilling rig. SSI has argued, on the basis of the holding in > Amstar Corp. v. M/V ALEXANDROS T., 431 F.Supp. 328 (D.Md.1977), that its verified complaint alone should suffice to allow attachment of the rig pursuant to Rule B. The district court in > Amstar did excuse the lack of an affidavit from the plaintiff in that case given that the plaintiff also filed a verified complaint which stated that the defendant could not be found within the district. However, > Amstar does not stand for the proposition that a

district court must excuse a plaintiff's failure to file the affidavit required by Rule B when the plaintiff also files a verified complaint. We cannot say that the district court erred in this case because it chose to enforce Rule B as it is written.

The affidavit required by Rule B serves a useful purpose: it assures the district court that the plaintiff has been diligent in searching for the defendant within the district in which the action is filed. > Oregon v. Tug Go Getter, 398 F.2d 873, 874 (9th Cir.1968); > West of England Ship Owners Mut. Ins. Ass'n. v. McAllister Bros., Inc., 829 F.Supp. 122, 124 (E.D.Pa.1993). As the district court said, the contacts that Central had with Mississippi raised questions about whether Central could be found within the Southern District of Mississippi. Thus, it was especially important that SSI demonstrate that it had been diligent about searching for Central and that SSI was not seeking attachment merely for purposes of security or harassment. There was good reason for the district court to enforce Rule B as written and refuse to attach Central's rig.[4]

IV.

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[4]Because we decide that the district court did not have personal jurisdiction over Central, we do not reach the other issues raised by Central in its appeal, including the choice of law question, the *forum non conveniens* issue, or the district court's calculation of damages. We also do not reach the question of whether ordering attachment of Central's rig would be consistent with the Supreme Court's holding in > Shaffer in light of the fact that the district court did not otherwise have personal jurisdiction over Central.

For the reasons discussed above, Central was not subject to the personal jurisdiction of the district court. Because SSI has failed to comply with the requirements of Rule B, we need not consider whether the district court could have taken jurisdiction over Central by attaching its property. Therefore, the judgment of the district court is VACATED and this case is REMANDED with instructions to DISMISS this case for lack of jurisdiction.

APPENDIX I

June 28, 2001

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-60591

SUBMERSIBLE SYSTEM, INC.,

Plaintiff/Appellee/Cross-Appellant,

v.

PERFORADORA CENTRAL, S.A. de C.V.,

Defendant/Appellant/Cross-Appellee.

Appeal from the United States District Court
For the Southern District of Mississippi

ON PETITIONS FOR REHEARING AND
REHEARING EN BANC

Before FARRIS*, JOLLY, AND DAVIS, Circuit Judges.

PER CURIAM:

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*Circuit Judge of the Ninth Circuit, sitting by designation.

In its petition for rehearing, Submersible Systems, Inc. ("SSI") argues that the district court erred in refusing to attach Perforadora Central, S.A. de C.V.'s ("Central") drilling rig then under construction in Pascagoula, Mississippi, contrary to the conclusion that we reached. See Submersible Systems, Inc. v. Perforadora Central, S.A. de C.V., 249 F.3d 413, 421-22 (5th Cir. 2001). In considering SSI's argument that the district court should have ordered the attachment, pursuant to Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims, we concluded that the district court did not err in refusing to order the attachment because SSI failed to file the affidavit required by Rule B regarding SSI's attempts to locate Central within the souther district of Mississippi. Id.

Following the release of our opinion, counsel for SSI contacted the district court and located the missing affidavit. The affidavit was evidently filed, along with several other documents, directly with Judge Russell upon commencement of the case. However, the affidavit apparently never made its way to the clerk of the court and so never became part of the record in this case. Thus, Judge Gex never saw the affidavit when the case was transferred to him after Judge Russell recused himself. Judge Gex located the affidavit in Judge Russell's office file after counsel for SSI contacted the district court following the release of our opinion.[1]

SSI has now renewed its request that we enter an in personam judgment in its favor against Central on the grounds that it filed the required affidavit and the district court should have attached Central's drilling rig pursuant to Rule B.

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[1] Central does not contest this description of events in the district court. We therefore GRANT SSI's Motion to Reconsider and order that the record be supplemented with the affidavit.

Central has argued that the affidavit was improperly filed, see Fed. R. Civ. P. 5 (e), and that SSI's efforts to locate Central in the southern district of Mississippi - as outlined in the affidavit - were inadequate. We need not consider these arguments, however, because the district court never attached Central's drilling rig and so never obtained jurisdiction pursuant to Rule B. The parties agree that the rig has now left the southern district of Mississippi. Now that the rig has left the southern district of Mississippi, the district court is unable to order the rig attached and acquire jurisdiction pursuant to Rule B.

Rule B establishes a procedure for asserting quasi in rem jurisdiction in admiralty and maritime cases. Great Prize, S.A. v. Mariner Shipping Pty., Ltd., 967 F.2d 157, 159 (5th Cir. 1992); Sembawang Shipyard, Ltd. v. Charger, Inc., 955 F.2d 983, 987 (5th Cir. 1992); 29 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 705.04 (3d ed. 1999). A quasi in rem action is a proceeding against the property of the defendant, and not the person of the defendant. As the Supreme Court has said,

> If jurisdiction is based on the court's power over property within its territory, the action is called 'in rem' or 'quasi in rem.' The effect of a judgment in such a case is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner, since he is not before the court.

Shaffer v. Heitner, 433 U.S. 186, 199, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977). Se also 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 108.70[2] (3d ed. 1999). As a quasi in rem action is a proceeding against

property, jurisdiction is perfected by service of process on the res. The Brig Ann, 13 U.S. (9 Cranch) 289, 291, 3 L.Ed. 734 (1815); The Rio Grande, 90 U.S. (23 Wall.) 458, 463-64, 23 L.Ed. 158 (1874); Republic National Bank of Miami v. United States, 506 U.S. 80, 84, 113 S.Ct. 554, 121 L.Ed. 2d 474 (1992). Failure to properly serve process on the res will necessarily mean that the district court does not have jurisdiction. United States v. 51 Pieces of Real Property, Roswell, New Mexico, 17 F.3d 1306, 1312 (10th Cir. 1994); United States v. Approximately 2,538.5 Shares of Stock Certificates of Ponce Leones Baseball Club, Inc., 988 F.2d 1281, 1288-89 (1st Cir. 1993).[2]

Because the district court did not have jurisdiction over Central, it was powerless to enter an in personam judgment against Central.[3] The district court must be able to attach Central's property in order to enter a quasi in rem judgment against that property. Because the rig has now left the southern district of Mississippi, the district court has no power to attach it. Thus, the district court is without jurisdiction to enter a quasi in rem judgment in this case.

SSI's Petition for Panel Rehearing and Motion to

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[2] Though we have held that subsequent removal of the res after attachment does not divest the district court of jurisdiction, see Elliott v. M/V LOIS B., 980 F.2d 1001, 1004 (5th Cir. 1993), and that an erroneous seizure of a vessel pursuant to Rule C will not deprive the district court of jurisdiction when the plaintiff could have proceeded pursuant to Rule B, see Sembawang, 955 F.2d at 989, we have never held that a district court has quasi in rem jurisdiction without actual attachment of the res.

[3] We have no reason to revisit our previous holding that the district court did not have jurisdiction over Central.

Withdraw the Panel Opinion are DENIED. No member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is also DENIED.